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PRODUCT LIABILITY ACT AMENDMENTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

AMENDMENTS TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

JUNE 18 AND 25, 1985

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CONTENTS

Page
Opening statement by Senator Kasten 1
Opening statement by the Chairman 2
Opening statement by Senator Pressler 3

CHRONOLOGICAL LIST OF WITNESSES

JUNE 18, 1985

Dodd, Hon. Christopher J., U.S. Senator from Connecticut 4
Feinberg, Kenneth R., attorney, special settlement master, agent orange product liability litigation; and Michael L. Goldberg, attorney 32
  Prepared statements:
    Mr. Feinberg 34
    Mr. Goldberg 41
Gorton, Hon. Slade, U.S. Senator from Washington 12
Mossinghoff, Gerald J., president, Pharmaceutical Manufacturers Association accompanied by Dr. Charles Leighton, Merck, Sharp & Dohme Pharmaceutical Co.; Howard J. Bruns, president, Sporting Goods Manufacturing Association, accompanied by Maria Dennison, Washington office; and James H. Mack, public affairs director, National Machine Tool Builders Association 16
  Prepared statements:
    Dr. Leighton 20
    Mr. Bruns 23
    Mr. Mack 27
Sevier, Ernest Y., past chairman, section of tort and insurance practice, American Bar Association; Raymond Marvin, executive director and general counsel, National Association of Attorneys General; and Michael J. Mullen, counsel, on behalf of the Product Liability Alliance 47
  Prepared statement of Mr. Mullen 52

JUNE 25, 1985

Opening statement by the Chairman 59
Opening statement by Senator Hollings 60
Chanzis, Norman, B., director of risk management, American Standard, Inc., and chairman, governmental affairs, Risk and Insurance Management Society, accompanied by Jon Harkavy, director, governmental affairs; Sol Schreiber, adjunct professor, Fordham Law School; and J. Robert Hunter, president, National Insurance Consumer Organization 159
  Prepared statements:
    Mr. Chanzis 161
    Mr. Harkavy 162
    Mr. Schreiber 170
Connor, Martin F., Washington corporate counsel, General Electric Co., on behalf of the National Association of Manufacturers; Phil F. Jenkins, Sweepster/Jenkins Equipment Co., and member of the board of directors and represenatative of the Farm Industrial Equipment Institute; Patrick J. Head, vice president and general counsel, FMC Corp., on behalf of the Business Roundtable Lawyers' Advisory Committee; and Joseph R. Creighton, vice president/senior legal adviser, Harris Corp., on behalf of the Coalition for a Uniform Product Liability Law 112
  Prepared statements:
    Mr. Jenkins 115
    Mr. Head 118
    Mr. Creighton 121

Keeton, Page, professor, University of Texas School of Law; George Priest, professor, Yale Law School; Andrew F. Popper, professor of law, American University; and Marshall S. Shapo, Vose professor of law, Northwestern University School of Law 73
  Prepared statements:
    Mr. Keeton 74
    Mr. Priest 85
    Mr. Popper 91
    Mr. Shapo 102
Kimmelman, Gene, legislative director, Consumer Federation of America; Linda A. Lipsen, legislative counsel, Consumers' Union; Glenn Nishimura, executive director, Halt Inc.; Joseph Goffman, staff attorney, Public Citizen/Congress Watch; and Pamela Gilbert, staff attorney, U.S. Public Interest Research Group 134
  Prepared statements:
    Mr. Kimmelman 136
    Mr. Nishimura 142
    Mr. Goffman 147
    Ms. Gilbert 152
O'Connell, Jeffrey, John Allan Love professor of law, Univertsity of Virginia School of Law 61

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

American Insurance Association, statement 175
Deane, John Russell III, general counsel, Specialty Equipment Market Association, letter 189
Gray, Robert L., executive director, DEMA, letter 179
Littlefield, Dr. Roy, executive director, Greater Washington/Maryland Service Station Association, statement 177
Mullin, Tracy, senior vice president, governmental affairs, National Retail Merchants Association, lettter 185
Stewart, Charles, president, Machinery and Allied Products Institute, letter 180
Sullivan, Joellen S., manager, special projects, Manville Building Materials Group, letter 178
Westhafer, Terry, president, American Retreaders' Association, statement 176

PRODUCT LIABILITY ACT AMENDMENTS

TUESDAY, JUNE 18, 1985

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee convened, pursuant to notice, at 10:05 a.m., in room SR-253, Russell Senate Office Building, Hon. Robert W. Kasten, Jr. (chairman of the subcommittee) presiding.

Staff members assigned to these hearings: David Zorensky, staff counsel; and Amy Bondurant, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. The committee will come to order.

Today the Consumer Subcommittee is holding the first of two hearings on the amendments of Senator Dodd and Senator Gorton to S. 100, the Product Liability Act. In January of this year, I introduced S. 100 which would preempt State law to establish uniform Federal rules and standards of liability for the recovery of damages relating to injuries caused by defective products.

The amendments to S. 100, introduced by Senator Dodd and Senator Gorton, also supersede State law to reform the current tort litigation system for product liability, but in addition they would establish a no-fault alternative claim system and would lower the burden of proof for the recovery of the limited damages by those injured by defective products.

These proposals give injured parties the choice of either bringing a traditional tort action in court to recover damages or utilizing an alternative claim system to recover compensation limited to net economic loss.

Although I believe that these proposals deserve serious consideration, it had been my hope that these so-called compensation scheme proposals would be addressed by the Commerce Committee after action on S. 100.

Last year, S. 44, legislation substantially the same as S. 100, was reported by the committee. This year, however, the members of the committee have expressed their desire to address the compensation issue now and to review these amendments as part of overall product liability reform and, as a consequence, we begin these hearings today.

The task before us is not an easy one because the proposals of Senator Dodd, Senator Gorton, and others raise many complex issues. We must consider such issues as the appropriate standard of liability for any alternative claim scheme and the proper measure of damages. We must ask, too, whether particular types of products such as drugs require different treatment and whether the different problems as to proof of causation require different treatment of various types of injury.

Moreover, review of the amendments of Senator Dodd and Senator Gorton also requires us to address more general questions about the overall objectives of product liability law and the proper relationship between any alternative claims system and the tort litigation system for product liability.

The issues are challenging; the issues are complex; but I welcome this undertaking and I am hopeful that these hearings will be productive because of the urgent need for product liability reform, a need that is recognized by Senator Dodd and Senator Gorton, and a need that provides some common ground for agreement.

Senator Dodd, Senator Gorton, and I take different approaches to the problem of product liability reform, but we all share the view that the existing system does not work and that a Federal solution is warranted. All three of us share the view that product liability reform is needed now, that neither the manufacturer nor the consumer benefits from the chaos and uncertainty of the existing product liability litigation system, and that action at the Federal level is required.

Thus, I remain hopeful that after these hearings a consensus can be reached on an approach to product liability reform that at least begins to establish uniform product liability law, to remove the uncertainties and inequities of the existing system, and to reduce the current waste of resources in litigation, and finally to simplify the process by which victims are compensated for product injuries.

And so I welcome Senator Dodd and Senator Gorton along with other witnesses today, and thank you all for your efforts to address the issues of product liability reform. I look forward to your testimony.

Before we begin with our witnesses, I would like to call on the chairman of the full Commerce Committee, Senator Danforth.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Mr. Chairman, thank you very much.

I want to express my appreciation for your perseverance in this effort. You really have been exceptionally diligent. I have high hopes that we are going to have a bill. I don't know of anybody who is satisfied with the status quo in product liability except maybe a few lawyers who like to be in court a lot, but I don't think consumers are satisfied, and I don't think that the business community is satisfied, so I admire your perseverance and I have a degree of optimism that we can put something together.

This morning the Consumer Subcommittee begins its hearings on the amendments to S. 100, the Product Liability Act introduced by Senator Dodd and Senator Gorton. These amendments would establish "no-fault" or strict liability compensation system alternatives to the existing product liability litigation system—alternative compensation systems with a lower burden of proof for the recovery of limited damages by injured parties who file claims with manufacturers instead of initiating lawsuits.

There is no question that the present litigation system is not working and that product liability reform is needed. Moreover, I believe that some form of alternative no-fault claim system is an essential part of such reform. Thus, I commend the overall efforts of Senators Kasten, Dodd, and Gorton to address the question of product liability reform and I welcome the opportunity provided by these hearings to study the specific proposals introduced by Senators Dodd and Gorton as amendments to Senator Kasten's bill.

It is my hope that after these hearings we can develop the necessary broad base of support for a comprehensive proposal that combines some reform of the existing rules and standards for product liability litigation with the establishment of an alternative claim system for compensation.

I believe that a broad base of support for such a proposal is possible because comprehensive legislation of this sort would address effectively and fairly the legitimate concerns of manufacturers, consumers, product sellers, and workers. It would provide greater uniformity with respect to liability, reduce transaction costs for everyone, and provide swift and more certain recovery for those injured by defective products.

To be sure, the development of such a proposal and support for it will be a very difficult task. But to further this process, I have invited interested representatives of the business community, labor organizations, and consumer groups to form a Product Liability Working Group. The purpose of this group which already has begun to meet in private, is to move beyond public posturing to establish a genuine dialog between these groups, promote greater understanding of their common concerns and interest with respect to product liability reform, and to foster the development of some consensus of support for reform legislation.

Positive efforts are being made by this group to develop such a dialog. It is my hope that these meetings will continue and that together with these hearings they will bring us closer to the enactment of comprehensive product liability reform legislation that we need.

Thank you, Mr. Chairman.

Senator **Kasten**. Senator Pressler, do you have an opening statement?

OPENING STATEMENT BY SENATOR PRESSLER

Senator **Pressler**. Well, Mr. Chairman, I thank you for holding these hearings. I am very sorry that we were unable to pass our bill the last time in the committee. I personally believe that the issue of product liability is the number one consumer issue of our time. I also feel that medical liability insurance is another consumer issue, and we must take steps to lower the cost to the consumer of products and medical services, and that is the purpose of this effort.

I have made several previous statements, and I really don't have a lot to add to those previous statements. We are in the process of studying both amendment proposals before us today. I have not taken a definite position on either plan. I am interested in hearing more about them.

The one point I would like to make is that whatever we ultimately produce, I think it is very important for this committee to move forward with some type of product liability reform that will decrease insurance and consumer prices and introduce some simplicity into the complicated, confusing, and contradictory system of today.

By doing this, maybe we can help ensure that the injured consumer, rather than the lawyers, get most of the award.

That is about my only comment at the outset. I have a number of questions and am ready to get on with the hearing.

Thank you, Mr. Chairman.

Senator **Kasten**. Thank you, Senator.

We are pleased to have Senator Chris Dodd, the Senator from Connecticut.

STATEMENT OF HON. CHRISTOPHER J. DODD, U.S. SENATOR FROM CONNECTICUT

Senator **Dodd**. Mr. Chairman, thank you. Is it all right if I talk from here?

Senator **Kasten**. Fine. You might want to turn on the microphone.

Senator **Dodd**. I have a long document which I have submitted to the committee, which I would ask be incorporated in the record.

Senator **Kasten**. The entire statement will be in the record.

Senator **Dodd**. Thank you, Mr. Chairman, and the chairman of the committee.

I am delighted to have the opportunity to appear today to discuss a proposal that I believe would improve dramatically the position of both people injured by defective products and the the manufacturers, distributors and sellers of such products.

Over the past 100 years, the fault system has moved closer and closer to the system it evolved from—strict liability—as a result of the availability of insurance and the changed mores of society. While I believe many of these changes have been beneficial to injured persons, the system still fails to compensate many people who deserve compensation.

In the 19th century, with the advent of the industrial revolution, strict liability gave way of fault liability. The change reflected the concern that a strict liability system would be so expensive that it would inhibit the development of socially useful but more dangerous products. Proponents of the fault system argued that it would encourage safety because manufacturers would try harder to avoid causing injuries and potential victims would be more careful because they knew they could not recover if their behavior in any way contributed to the injury.

Just as the introduction of the fault system was based on the circumstances and mores of that time, so, too, are the recent changes in laws, court decisions and jury verdicts that have brought the fault system closer and closer to a strict liability system. In large part, the changes flow from the fact that people whose products or activities have a tendency to injure others—from manufacturers to doctors to drivers of automobiles—could ill afford to bear the full extent of the losses themselves and so purchased insurance to spread the risk. Plaintiffs' lawyers are aware that most people have insurance and so sue more often. Judges and juries are similarly aware of the insurance and so have found ways to restrict the rather harsh requirements of the fault system in order to compensate more plaintiffs.

I believe that the original fault system was a harsh and unfair one and I believe that many of the changes—such as the move to comparative negligence and repeal of the hostguest statutes—have produced a fairer system for injured persons. Nevertheless, while the move back towards strict liability has been beneficial for many injured persons, the system still fails to compensate many people who deserve compensation and the lawsuit system is a remarkably inefficient and expensive way of delivering those benefits. The result has been to raise dramatically the costs of the system.

I am convinced that it is not possible to improve significantly the lot of injured persons and meet the legitimate objections of manufacturers by tinkering with the fault system. It seems to me, we need a new approach.

Let me explain why I think the debate over S. 44 and S. 100 has missed the mark. First, I think the enactment of such legislation would not have the effect that its proponents have stated. I don't think it would significantly reduce the number of awards in bizarre accident cases because judges and juries can and do stretch most factual situations to fit any legal rules when they are sympathetic to the plight of the injured party. There is no reason to believe that the provisions of S. 100 would change those reactions and the opportunities the fault system provides for granting recoveries.

Moreover, I do not think that enactment of S. 100 would reduce transaction costs because they are the result of having to use the legal system to settle cases, not because lawyers spend a lot of time researching the law. While I do not think S. 100 would have met the manufacturers' concerns, I also believe the present system is not acceptable for injured persons. The system fails to pay a significant number of people who we all consider worthy of compensation. It grossly overpays people with small losses and sadly underpays those with the most serious losses. It takes too long to pay the people it does pay, and it is highly inefficent, paying more to lawyers and insurance companies than to victims.

Let me be more specific. Let me state that most of the data that I am using is derived from the comprehensive study of some 24,452 claims done by the Insurance Services Office in 1977. Let me state at the very outset here as an aside, that is an older study and I realize it is some seven or eight years old, and I realize there has been some data collected since then, but nothing quite as comprehensive as that ISO study done, even though it is getting dated a bit.

But I have not seen any evidence to contradict the fundamental conclusions of that data.

First, the ISO survey, as I am sure you know, Mr. Chairman, shows that one-third of all claims were closed with no payment. While it is impossible, obviously, to tell from the data how many of those people were innocent victims, it is clear that many of these people would fit into the following categories of innocent injured persons:

No. 1, people who cannot identify the maker of the product;

No. 2, people who are injured by a product where the manufacturer was not negligent, in States that do not apply a strict liability standard, or in many that employ a risk-utility test;

No. 3, people injured by unavoidably unsafe products, a defense based upon the utility of the product to society as a whole, regardless of its effect on particular individuals—as in the DPT vaccine cases; and

No. 4, people whose negligence made a minimal contribution to the injury, in states that maintain the defense of contributory negligence.

Second, the pattern of recovery for those who prevail finds the amount of recovery as a percentage of economic losses goes down as those losses rise. The people with the greatest economic loss recovery other than those with no losses, who recovered an average of $804 were those with economic losses between $1 and $1,000, who recovered an average of 482 percent of economic loss—the amount over 100 percent being for noneconomic damages. Technically, the highest recovery belongs to the second largest category of prevailing victims, those with no economic losses. Since this group's recovery averaged $804 a person, their percentage recovery was infinity.

Part of the reason for such a high recovery at such levels of loss lies in the nuisance value of a claim, where it is cheaper for a company to pay a small amount in a questionable case than it is to fight the claim. Nevertheless, the survey did find that losses up to $100,000 were compensated on the average at more than 100 percent of economic loss.

After $100,000 of losses, the picture changes dramatically. People with losses over $100,000, those most demonstrably in need of compensation and most of those with the worst pain and suffering, were 2 percent of the victims, but they incurred 78 percent of the losses. On the other hand, they received only 32 percent of the payments.

The disparity between losses and recovery was most dramatic with the 10 people whose losses exceeded $1 million. Their net recovery, after subtracting their attorneys' fees, was only 6 percent.

These figures disguise another problem—that there is tremendous disparity of recoveries among claimants with similar losses. The fact is that about half the people with economic losses over $10,000 recovered less than than their economic losses while the other half recovered more than their losses and that both of the under-recoveries and the over-recoveries were substantial support the belief that similarly situated people are receiving dramatically different treatment under the fault system.

Almost as disturbing was the ISO finding that it took 5 years to pay the claim with the average dollar amount involved. For people who have inadequate resources to pay for their medical and rehabilitation losses and their work losses—which is most of us—it is an unconscionably long time. Moreover, studies have shown that when rehabilitation has to be delayed, the degree of recovery achieved is less than when the problem can be treated immediately.

Other studies have revealed the fact that people with lower incomes and lower educational levels recover far less than their middle class counterparts because they have less access to attorneys, cannot afford to wait as long to recover and often are not good witnesses.

The final disturbing fact revealed by the ISO data is that the fault system is highly inefficient, paying attorneys for both sides as much as victims, before even taking into account the considerable overhead costs of insurance. The fact that attorneys make so much money from this system is not a criticism of attorneys; it is the logical result of a system that requires attorneys for resolution.

For all these reasons, the fault system does a poor job of providing compensation to injured persons. Moreover, because of its uncertainty and unpredictability, it is also of questionable value in deterring the production of unsafe products.

Unfortunately, both sides of this debate so far have focused on how to tinker with the fault system to produce better results for their interests. I think they have missed the major point—the lawsuit system itself is the problem.

The amendment I have introduced, the Product Manufacturers' Responsibility Act of 1985, is not designed to change the objectives of the fault system which, of course, are compensation, punishment, and the creation of incentives to produce safer products. Instead, the amendment is designed to achieve those same objectives more fairly and efficiently.

The amendment has four basic purposes, Mr. Chairman.

No. 1, to provide a faster system of assured by limited compensation of economic losses of innocent people injured by unsafe products.

No 2, to encourage the production of useful new products by responsible manufacturers by placing limitations on damages in the claims system.

No. 3, to retain the tort system to punish negligent manufacturers and to help deter carelessness by other manufacturers.

No. 4, to reduce the overhead costs associated with the present lawsuit system and thus reduce the cost of consumer goods.

The legislation seeks to achieve these goals by giving injured persons a choice between seeking recovery for their economic losses in a speedy claims system with a lower standard of proof for recovery and seeking full tort damages—economic, non-economic, and, where appropriate, punitive—in a fault system in which they would have to prove that the manufacturer was negligent in producing the product.

The system I am proposing can be viewed, in the words of Prof. Guido Calabresi, Dean of the Yale University School of Law—I am quoting him here—as "a dog with two tails." Thus, the claims system would be the source of recovery for most people, while there would be two residual lawsuit systems. One would be a traditional fault system for those who do not wish to pursue compensation through the claims system—one tail—while the other would be a legal system to enforce payment under the claims system where the manufacturer refuses to pay—tail two.

Let me describe the claims system briefly, if I can. It is similar to the present strict liability system, except that it is carried out without attorneys and recovery is limited to economic damages. It does not consider the conduct of the manufacturer at all. An injured person can recover economic damages—medical and rehabilitation expenses as well as work loss, replacement service loss, and loss due to death—directly from the manufacturer if the person was injured by an unsafe product, one that caused the claimant's harm by being used in a manner and for a purpose which was anticipated by the manufacturer or which occurs so commonly among product users that the manufacturer may be assumed to have anticipated such use.

The amendment denies injured persons recovery in four situations, all of which are designed to cover cases where the injured person was in the best position to avoid injury. Thus, a person may not recover in the following situation:

No. 1, where the injury was caused by an open and obvious danger, a concept that has been interpreted by the majority of courts to address dangers that are recognizable and obvious, such as injuries caused by sharp knives, alcohol, tobacco and so forth.

No. 2, where the injury was caused by an alteration or modification to the product by the claimant:

No. 3, where the injury was the result of the claimant's assumption of the risk; and

No. 4, where the injury was caused by the gross negligence of the injured person.

This standard is designed to afford recovery to innocent persons who are injured by products, regardless of the degree of care taken by the manufacturer. The judgment is that as between two innocent parties—the injured person and the manufacturer—the manufacturer should bear the loss. There are two reasons for this judgment; one, that the manufacturer was in a better position to avoid the loss; and two, the manufacturer is better able to absorb the loss.

The tradeoff that an injured person makes going into the claims system is foregoing a chance to hit the jackpot in the lottery system of fault in 5 years for the greater certainty of being made economically whole more quickly in the claims system.

Speedy recovery is crucial to injured persons, particularly the severely injured. By guaranteeing payment to innocent persons through the claims system within 75 days, my amendment will enable people to have the economic wherewithal to get on with their lives.

The next issue that arises in designing a claims system is what to do when there are disputes as to the cause or the amount of the injury. The system contained in this amendment, my amendment, seeks to provide sufficient penalties on the manufacturer who fails to pay to encourage payment in legitimate cases and probably in ones that are close to the line, but low enough penalties to encourage a manufacturer to dispute a claim where it legitimately does not think it is responsible. This is an area where reasonable people can disagree, but let me outline the basic approach.

A manufacturer would have three choices after it receives a claim. First, it can pay the claim, which means paying the injured person for net economic loss, the amount of loss after deducting what the person is entitled to from other sources for the same injury, such as private health insurance and workers' compensation.

Second, a manufacturer may agree that it is responsible for the injury but dispute the appropriateness of the expenses. In that case, the matter would be given to an arbitrator to decide.

Third, a manufacturer might dispute responsibility for paying the claim. In that case, the injured person could sue the manufacturer, either through a traditional fault lawsuit or under the claims system. Under the claims system, a person who establishes a case based on the standards discussed previously would be entitled to net economic loss, a 2 percent per month interest penalty—to discourage manufacturers from holding onto the money to earn interest—and a reasonable attorney's fees. Obviously, the manufacturer also would have to pay its own attorney's fees. This is the system used in all the no-fault automobile insurance States and the record shows that the insurers are complying.

In sum, Mr. Chairman, people who avail themselves of the claims system would secure the following advantages over today's fault system: greater certainty of recovery for "innocent" victims, speedy and timely recovery; and recovery according to their losses, even where those losses exceed $1 million.

While I am confident that the claims system I have outlined would be a dramatic improvement over the present fault system, I'm sure that the members of the committee can use their considerable expertise to devise an even better system.

There is one matter that I believe may well warrant further attention, and that is while the system proposed in my amendment should work well with most products, there are some products that may be better off handled in a different way. I have in mind injuries where it is difficult to prove causation, as in the case of many toxic illnesses, particularly ones with long latency injuries and injuries caused by pharmaceuticals.

The problem with the latter group is that almost all drugs are accompanied by side effects. To the extent that such side effects are clearly warned against and those warnings are understood by the injured person, I think it may not make sense to hold the manufacturer liable. There may be other similar situations we need to address. While the defense of assumption of the risk may cover these situations, it is a matter that I think deserves the Committee's careful attention.

Let me complete the description of my amendment. An injured person could still choose, as I noted at the outset, to sue in the fault system, either initially or before this claim is paid out. However, once a person filed a fault lawsuit, the person could not thereafter utilize the claims system.

The fault system I have included is a limited one, the most significant features of which would be to prohibit the application of strict liability in design defect and failure to warn cases and to apply a fair statute of limitations for injuries that have long latency periods.

I do not think, however, that the committee should end consideration of what an appropriate fault system should look like with my proposal. While I do not pretend to be sufficiently expert to design the best possible fault system, I would just like to suggest a few things.

First, I think there should be a fairly comprehensive, preemptive Federal fault system because I think manufacturers should be able to market their products throughout the country with some confidence that they can market them in the same way in each State.

Second, I do not think the provisions of S. 100 would fit as a simple attachment to my claims section. Your bill, Mr. Chairman, was drafted as an attempt to address all the elements of the tort system—compensation, punishment, and deterrence. Once you have a separate claims system to assure compensation, you really want the residual fault system to focus more on punishment and deterrence. That means that it should be hard to get into the fault system, in that you only want people there who believe that the manufacturer's conduct was truly negligent, or worse.

At the same time, while you want the fault system to be hard to get into, you probably want to make it easier for the injured person to make the case in that system. This may necessitate some changes in present day rules of discovery and record keeping.

Finally, let me just make a comment about the incentives for safety that this approach would present. Of course, my amendment would retain the fault system for those who wished to sue negligent manufacturers. But the fault system has limitations as a deterrence system today because of its very unpredictability. The greater certainty of recovery in the claims system also would provide strong incentives for safety. Any manufacturer that has to pay a lot of claims, even for smaller amounts, will have a distinct competitive disadvantage relative to its safer competitors. Thus, the greater certainty of payment under the claims system, coupled with the unpredictability of the fault system, will I believe provide for stronger incentives for safety than exist today.

In sum, Mr. Chairman, I believe that the system I have proposed will provide faster, more certain, and more equitable compensation for injured persons, greater incentives for product safety, and greater predictability and lower system costs for manufacturers than either the present fault system or any of the proposals to reform it.

Mr. Chairman, I should have said at the outset, by the way, that I have nothing but the highest regard and respect for what you have been going through, and the committee has, I know in the last several years, in wrestling with this most complicated issue and problem.

And I offer this amendment, as I said, as a different approach rather than the one which I think has merely tried to work with the existing fault system and tort system. But in no way am I suggesting that I do not have the highest regard and respect for what this committee has been trying to work out for the last number of years, and I thank you for allowing me to testify. And I again apologize to the panel of witnesses.

Senator KASTEN. We thank you for your testimony, and I think there are a number of areas in which we have common ground. There are a number of areas in which we differ. And without getting into detailed questions at this time, I want to say that we look forward to continuing to work with you toward the basic goals that I think all of us share.

Senator Danforth, do you have questions of Senator Dodd?

The CHAIRMAN. I appreciate Senator Dodd's efforts. I think this is a major contribution. I just hope we can pass a bill with elements of your approach and Senator Kasten's approach and get on with it.

Thank you.

Senator KASTEN. Senator Pressler, do you have any questions for Senator Dodd?

Senator PRESSLER. I want to thank Senator Dodd for his presentation. And just walk me through one short example—and let me say that this is a friendly question—of someone who is injured, what their choice would be.

Senator DODD. Well, the injured person could choose the claims approach, which as I noted would really just give you economic recovery to compensate an injured person for work loss, the medical expense and so forth, those kind of indentifiable injuries. The manufacturer would have 75 days to pay.

The notion would be that you would get quick compensation for your real losses. That is one choice. The injured person has the choice. That is basically what it is designed to do—say we are going to give you the opportunity to be compensated for your real losses. That is one road you can go down. We are not excluding the tort system.

That same person can decide either because of the extent of the injuries or the negligence of the manufacturer, that they would prefer to not only recover their real losses, but to recover punitive losses, for instance. In that case, they can choose the tort system, the fault system.

However, once they have chosen the fault system, the tort system, they cannot then go back to the claims system. In the claims system, if you have, as you are apt to have, manufacturers who will say well, look, even though I understand what you are saying, I think you are wrong and I am going to contest that. We then would allow, obviously, for the injured party to pursue under the claims system a lawsuit against the manufacturer.

So it is providing options.

Senator PRESSLER. Let us say that a person hurt their arm slightly and they lost 3 weeks of work or 3 weeks of pay or 3 weeks of economic activity. And they would opt for that. And then a year later there was a latent defect in the arm. Could they then go back for more, or would they be completely barred?

Senator DODD. Up to 3 years.

Senator PRESSLER. Up to 3 years.

Senator DODD. There is a statute of limitations.

Senator KASTEN. Again, we thank you very much and look forward to working with you. I think we have got an opportunity to make some real progress.

Senator DODD. Thank you, Mr. Chairman.

Senator KASTEN. Now the testimony of Senator Gorton. And, Slade, you can stay right there or you can move to where Chris is, whatever. I think you look comfortable where you are.

Senator GORTON. Thanks. I will stay right here.

STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM WASHINGTON

Senator GORTON. Thank you for taking up these two amendments to S. 100. And I join Senator Dodd in praising you for bringing this whole area to our attention. I am convinced, Mr. Chairman, that there are times when you wish you had never heard of this issue, and perhaps that is true with all of us, but it is an area which is so important that attention must be addressed to it. Having the courage and wisdom to do so is something for which you should be greatly praised.

A starting point in any discussion of the need for reform should be the goal of the product liability system. It seems to me, Mr. Chairman, that there are three objectives which we see.

The first is to promote the most efficient level of accident prevention, a concept which entails both the manufacturing of safe products and the actions of the people who use those products.

The second goal is to provide that those people who are injured by defective products can be made "whole," by whatever definition of both "defective" and "whole" society prefers.

The third goal is to accomplish the first two in the way which is most efficient both in time and resources, looking particularly at the victim, and also the manufacturers and in reducing transaction costs.

One of the great defects of the present system, of course, is that those transaction costs are more often than not greater than the actual recoveries and that the time and complexity of reaching decisions is excessive.

The next inquiry is to decide whether the current system for resolution of product liability disputes is adequate. I submit that although it certainly has some redeeming characteristics, our current system is not sufficiently effective at achieving these goals and is likely to become less so as cases become more complex and impact on larger and larger classes of people.

Although this present system does encourage safety to some degree, it is certainly not successful at compensating all persons injured by defective products in an equitable and timely fashion. All of us have heard of awards which strike us as being excessive or unwarranted, while we also hear of deserving people who go totally uncompensated. Moreover, the time and judicial resources required to obtain many awards and considerable and often unnecessary.

Finally, the present system is in many cases unpredictable and thus obtaining insurance coverage becomes more and more difficult, threatening to increase the cost of goods and making some goods unavailable.

S. 100 and its predecessors constitute an attempt to address some of these concerns. Although I supported that effort at the outset, the more I studied the bill, the more I became convinced that it did not address the problem in its entirety, and with respect to those elements of the problem that it did address, was not likely to achieve its intended result.

Briefly, I continue to believe that S. 100, if enacted, would have no immediate impact on uniformity, but rather would encourage additional litigation over the meaning of its terms. The bill would not have any significant impact on the excessive time and resources consumed by these disputes. Because the bill would fail to provide compensation for persons currently eligible under the law of many States, result-oriented courts would merely find inventive ways to use the language of the act to provide recovery for plaintiffs they believe should recover.

In addition, the bill would constitute a significant departure from our traditional allocation of authority between the Federal and State governments and, for this reason, has the opposition of groups and individuals who might otherwise favor reform in this area and whose strenuous and legitimate objections make passage of such a bill unnecessarily difficult and perhaps impossible.

And finally, there may be constitutional problems with a bill that seeks to alter existing rights and remedies or defenses unless there is some equivalent benefit substituted therefore.

There last point was made in the Interagency Task Force on Product Liability Report. Although the issue has never been directly addressed by the Supreme Court, to my knowledge, the task force report noted, "(t)his quid pro quo element was strongly emphasized by the Court in its decision upholding the constitutionality of New York's Workmen's Compensation Act." (citing, *New York Central R.R.* v. *White,* 243 U.S. 188, (1971)).

Because of these concerns with S. 100, I have tried to develop a proposal which I think will better achieve the goals I have stated than does that bill or the status quo. I do not assert by any means that I have found the solution or even the approach.

On the other hand, the approach has enough appeal to me and makes enough intuitive sense that I believe it to be worth review and consideration. I have no doubt that we will be called upon to enact some type of tort reform in the relatively near future and that we must start to consider alternatives such as this and that of Senator Dodd.

Rather than recite precisely what the bill does section-by-section, I will tell the subcommittee what its purposes and some of the mechanisms employed to promote those purposes.

One of the primary concerns of manufacturers expressed to me in the course of this debate is the variety of legal standards to which manufacturers are held. I am very troubled, however, by the prospect of substituting a Federal standard of liability, particularly absent Federal question jurisdiction for the Federal courts, for the substantive law of the several States.

In my view, a better approach is to design a system that encourages only colorable negligence claims to be brought in the State courts. In that way, State courts will be interpreting law with which they are familiar. The common law will continue with its inherent flexibility to handle peculiar cases, and the Federalism concerns of many of the opponents of S. 100 will be sharply reduced.

In this regard, my proposal prohibits damages for noneconomic losses in design defect and failure to warn cases where liability is not premised on the fault of the manufacturer or the seller. Moreover, substantial penalties result if the plaintiff is unable to present a prima facie case negligence claim in such cases.

The bill does provide some uniform provisions with respect to State laws, but the application of those provisions require little interpretation, since they are largely procedural. Those provisions include: a uniform statute of limitations; a uniform statute of repose based on the useful safe life of the product; a uniform choice of law rule; a uniform rule on joint and several liability; a uniform rule on the admission of evidence of subsequent remedial measures, and; a uniform rule of liability of the product seller.

In my view, once these uniform rules are superimposed on the negligence rules of the States, the variation remaining among the negligence laws of the States will be slight indeed, and certainly insufficient to warrant the imposition of a Federal substantive rule of liability with the uncertainty involved in so doing, as well as the political problems associated with it.

The provisions of the compensation title of my proposal are intended to promote the speedy recovery of net economic loss for persons injured by defective or unreasonably dangerous products.

The bill seeks to provide the recovery allowed in this title in a speedier fashion than current law in three principal ways: First, it creates a right to be paid within a designated period of time—60 days—in those cases in which liability exists; second, it attempts to limit the number of debatable issues among the parties; third, it provides incentives for both parties to settle and disincentives to prolong unnecessarily the debate.

Among the incentives and disincentives are:

(a) Interest on the amount due commences to run at the time the initial period for payment expires;

(b) Prior to trial, if one is necessary, the defendant is required either to deny liability or to admit liability and make a final offer of settlement;

(c) A settlement conference is required prior to trial, which is aided by the defendant's response to the requirement just mentioned;

(d) Either party could be penalized for failure to act in good faith in the course of the proceeding: a presumption is created that if the verdict is 20 percent or more above the final offer of the defendant, the defendant was not acting in good faith in making that offer. Alternatively, if the verdict is 20 percent or more below the final offer, the presumption is that the plaintiff did not act in good faith in rejecting it; and

(e) A criminal penalty is provided for bringing a fraudulent claim.

The bill would also tend to speed up the process and limit debate by allowing recovery of only net economic loss, thereby restoring the injured parties to their pre-injury economic status but at the same time not unduly penalizing a manufacturer who was not negligent.

Of course, we are talking about recovery only for people injured by products which are in some way out of the norm of our expectations for product performance, whether you call that defective, or unreasonably dangerous, or something else.

I do not believe anyone is advocating causation as the sole determining factor. The difficulty, of course, is to craft a standard easily understood by the parties, which can distinguish between someone who is cut by a knife in the normal course of its use and a young woman who develops cancer because her mother took DES.

I do not claim to have found the perfect formulation, but I intend to work with all interested parties to try to get as close as we can. In particular, I look forward to hearing more from the distinguished members of the academic community who will offer their insights at the next hearing as this process continues.

Finally, this is a two-tiered system. State law and an economic restitution proposal would require a choice on the part of the injured party. That choice would be irrevocable from the time a complaint is filed under the State system or a tender offer is accepted or complaint filed under the restitution proposal. Thus, there is no threat of duplicative recovery.

Mr. Chairman, I am convinced that most people are risk-averse. That is, given the choice of a quick, albeit reduced recovery, or proceeding at the often plodding pace of the existing court system for an uncertain recovery, with all the trauma which can be associated with a court battle, most people will choose the former, particularly if we provide the proper level of incentives and disincentives for the two methods of recovery.

For instance, in the course of a consumer survey conducted for the purpose of evaluating the success of Michigan no-fault auto insurance, this question was asked: Would you give up the right to sue for pain and suffering in all cases but the most serious, in return for prompt, complete payment of all medical bills and your lost wages? A 53.1 percent of those responding said yes; 28.9 percent said they did not know; and only 18 percent said no.

I realize, Mr. Chairman, that the situation before us is not entirely analogous to no-fault auto insurance, but our experience in that regard is nonetheless instructive.

With further study and a better factual basis, I believe we can ultimately design a system that better serves both safety and equity for all parties. I believe we can because we have no choice.

Once again, I thank you, Mr. Chairman, and the members of the subcommittee.

I might add to this formal statement that the answer which Senator Dodd gave to Senator Pressler, to his question, would be similar but not quite identical. It proceeds from the same point of reference his does, requiring a choice up front, with an almost certain recovery taking place without having first to prove negligence or strict liability or the like, but a limited recovery—one limited to actual economic loss—with the alternative being going through the present system with some limitations on the present system and some additional uniformity.

Senator **Kasten**. Thank you, Senator, for your testimony. We have a number of questions, but I think we are going to have an opportunity to work our way through this issue back and forth, and after we have the next panel next week, we will have a chance, I think, to start to go through some of the detailed questions.

So I just want to say that I agree with you and with Senator Dodd, and I think Senator Danforth and Senator Pressler, that we must in fact enact some kind of Federal legislation in this area in the very near future.

The problems are increasing. The insurance costs are going up. The uncertainties are increasing. The cost of the process is becoming wasteful in terms of attorneys' fees on all sides. And we look forward to working with you.

Senator Danforth.

The CHAIRMAN. Thank you, Mr. Chairman. I have no questions. I again want to compliment Senator Gorton on his efforts.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. I would like to request that committee staff take a look at these two excellent proposals, and I compliment Senator Gorton on his presentation, but I would like to see three simple examples of the Gorton proposal—I mean three examples of injuries and then a chart that says under the Gorton proposal and the Dodd proposal, what would happen when—three simple examples of what would probably happen under the three proposals laid out on a sheet.

Senator KASTEN. That is a good suggestion. I will ask the staff to proceed that way and take a couple of examples and we will just work them through. We might even take a look at the present law, under present law what would happen with S. 100, what would happen with S. 100, with Dodd, what would happen with Gorton. And we can start to work through a couple of examples. I think that might be very helpful.

Senator GORTON. Thank you very much.

Senator KASTEN. Thank you for your testimony.

Our first witness—first of all, the witnesses understand that the entire written statements will be made a part of the record. Due to the time constraints, we ask each of you to summarize your prepared statement in approximately 5 minutes or less so that we will have an opportunity for questions and comments and have an opportunity to work out way through the other witnesses.

Committee questioning of panel members will begin after all witnesses of each panel have completed their testimony so we have an opportunity to address questions to all members and you will have an opportunity to reply if you so desire.

Or first witness on this panel is Mr. Gerald Mossinghoff, who is the president of Pharmaceutical Manufacturers Association.

Mr. Mossinghoff.

STATEMENTS OF GERALD J. MOSSINGHOFF, PRESIDENT, PHARMACEUTICAL MANUFACTURERS ASSOCIATION, ACCOMPANIED BY DR. CHARLES LEIGHTON, MERCK, SHARP, & DOHME PHARMACEUTICAL CO.; HOWARD J. BRUNS, PRESIDENT, SPORTING GOODS MANUFACTURING ASSOCIATION, ACCOMPANIED BY MARIA DENNISON, SPORTING GOODS MANUFACTURING ASSOCIATION, WASHINGTON OFFICE; AND JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS ASSOCIATION

Mr. MOSSINGHOFF. Thank you, Mr. Chairman, and members of the subcommittee.

I am, as you note, the president of the Pharmaceutical Manufacturers Association. PMA represents 120 research-intensive pharmaceutical companies that develop and produce most of the prescription medicines used in the United States. We really appreciate this opportunity to testify on compensation for product-related injuries.

With me this morning as part of the PMA group is Dr. Charles Leighton, a physician, and vice president for regulatory affairs and research administration of Merck & Co. Also in the audience is Bruce Brennan, our senior vice president and general counsel.

I think you know how important the issue of product liability is to the pharmaceutical industry. Where there is no-fault and no liability, just the enormous cost of defending product liability lawsuits is a major problem for our industry.

In many cases, we have won our lawsuits, but again the amount of cost of effort in defending them outweighs sometimes the benefits that the companies can get from their products. At least one safe and important product is no longer available, simply because it became a target of the contingent fee bar. All of this is causing insurers to limit severely the coverage they will provide to our industry.

Mr. Chairman, the product liability situation facing the pharmaceutical industry has become a threat to the continued development of new and improved medicines. We should hold a drug manufacturer fully responsible for illness or injury caused by the manufacturer's negligence. But today, millions of dollars and enormous amounts of scientific energy—resources that should be spent finding new cures—are being wasted defending useful and properly made products. As Senator Dodd had indicated, our tort system has become a de facto lottery. Multimillion dollar verdicts are becoming commonplace including large punitive damage awards. In one recent pharmaceutical case, $2¾ million in punitive damages were awarded for failure to warn of a rare kidney disorder even though this disorder occurs spontaneously and has never been proven to be caused by the drug. Moreover, FDA was fully informed of all the relevant information and the product and the manufacturer's directions and warnings were approved by FDA. At least one safe and important product is no longer available simply because it became a target of the contingent fee bar. All of this is causing insurers to limit severely the coverage they will provide our industry.

Bendectin was the only drug available to treat the debilitating nausea that many women suffer during pregnancy. Last year its manufacturer, Merrill-Dow, took it off the market because it faced hundreds of suits alleging that Bendectin caused birth defects.

Subsequently, using an innovative and very effective technique, Federal Judge Carl Rubin in Cincinnati held a consolidated trial of hundreds of Bendectin cases before him. The only issue at the first stage of a two-stage trial was the scientific threshold question of causation. The jury found that Bendectin did not cause birth defects. As editorialized by the Washington Post, and I quote:

> It is not surprising that the plaintiffs and their lawyers feel that the verdict would have been different if they had been able to describe to the jury their children's problems and their own financial and emotional difficulties in dealing with them. But bending the tort law to require manufacturers to pay for damages not of their doing is not only bad for business and ultimately for the economy, it is also corrosive to the country's sense of justice and fair play.

But this was just one case, and the damage is already done. The product is no longer available. Moreover, Judge Rubin's approach is over-balanced by a host of other cases in which the patchwork of State laws is doing real damage to industry generally, to our industry in particular and, in the long run, to everyone who needs our products.

This has been the principal reason that PMA has supported your efforts, Mr. Chairman, to enact Federal product liability legislation and specifically S. 100. We would like to see legislation along the lines of S. 100 enacted as soon as possible.

However, as you point out, it is now being suggested that Congress simultaneously consider establishing some form of no-fault compensation that would make a manufacturer liable for all product-related injuries without regard to the manufacturer's conduct.

Even if there is a workable basis for such a system—and we have grave doubts on the score as to pharmaceuticals—any such legislation could easily leave everyone, manufacturers and the product-users alike, in a much worse position.

Any compensation system must address the special problems raised by the unique nature of pharmaceuticals . The most important of these is the unavoidable risk-benefit nature of drugs. The very formula that produces the desired result of alleviating or curing illness is the same formula that also unavoidably causes unwanted side effects.

Let us assume that a patient has cancer and is told that the only cure is chemotherapy with a specific drug. Let us assume further that he is told that the drug will also cause serious, although probably not fatal side effects. It would not make any sense in our view to allow him to demand compensation from the manufacturer for the side effects when his life was saved or prolonged by the drug. I believe there would be general agreement with that conclusion.

In our view, that conclusion is valid even where the risks are not as obvious or where the probability of side effects are not as certain. Here again the role of the physician is critically important.

Another serious problem with pharmaceuticals is establishing causation. With most products, it is obvious whether or not they cause injury and most injuries are immediate. Not so with pharmaceuticals. For the most part, the side effects which pharmaceuticals can cause are the same type of illness or injury which can occur naturally. It is, therefore, difficult, if not impossible in many cases to say whether an illness or injury which occurs during use of a drug—or months or years after use—was caused by the drug or occurred naturally. Causation is an even more difficult determination when a patient is treated with a number of drugs, which is not unusual.

Consider a patient who has a cardiac condition and is under treatment with several drugs. Assume his life is prolonged, but he ultimately dies from complications which could be natural or could be caused by one or more of the drugs. Does it make sense to engage in lengthy proceedings to determine if any of the drugs caused his death, and, if causation is found by a court, to make the manufacturer of the drug, which prolonged his life, pay his family's total economic loss?

With reference to the Bendectin type situation, a number of birth defects unfortunately occur naturally. If mothers took no drugs at all, many birth defects would occur. If the mother of a child is taking a drug during pregnancy, it is frequently impossible as a scientific matter to say whether a birth defect was caused by the drug or occurred naturally. Clearly there must be a determination that a product caused an injury before anyone can demand compensation.

Other pharmaceutical issues which would need to be addressed are the role of the prescribing physician, who is a key player in evaluating the risk-benefit question; the problem of the "unidentified manufacturer," who may have in no way contributed to the injury; and use or prescribing not in accordance with the FDA approved product labeling.

Mr. Chairman, there are many other examples that we could give and we are preparing a statement by Dr. Leighton that we would ask permission to submit for the record of this hearing.

Senator KASTEN. Without objection, so ordered.

Mr. MOSSINGHOFF. We are gratified that Senator Dodd, for instance, has indicated that pharmaceuticals do not fit neatly into his scheme. We are encouraged by his willingness and the willingness of the committee to explore this issue as it relates to pharmaceuticals.

We have already begun that process at the PMA. Discussions have been ongoing for some time with our companies' senior lawyers. But recently we formed a compensation study group to see if some form or concept of no-fault compensation might be appropriate to the pharmaceutical industry. We are not optimistic that any compensation system can be developed which would be workable, but we have established this group to include not only our senior lawyers, but also risk managers from our member firms. We also intend to involve experts in insurance in the group's deliberations.

The group has begun its work and the board of directors has requested that its initial report be completed for review later this fall.

Quite frankly, Mr. Chairman, we do not know if there is any sound basis for compensation for pharmaceutical or how to deal with their unique characteristics. Nor do we believe that anyone else currently has the necessary information. Certainly legislation which would cause such a profound change in the law should not be adopted unless its financial impact on all industry, including ours, has been extensively studied and until its social and economic costs can be predicted with some certainty.

In the meantime, we believe that any legislative consideration of a no-fault compensation system would be premature and risk severe unintended consequences.

We have carefully reviewed the amendments developed by Senators Dodd and Gorton. We think that many aspects of these proposals are unworkable. They do not address tort law reform in a satisfactory manner or the relationship between tort law and compensation. Moreover, as currently drafted, both would create new, massive, wholly open ended and unpredictable liability for our industry. We are told—and understand that you will hear testimony from the insurance industry—that it would take at least 3 to 5 years of experience before it would be possible to obtain insurance under either the current Dodd or Gorton proposals. We are, therefore, opposed to them on this ground alone. Our industry could be devastated during the interim.

Mr. Chairman, our members invest approximately $4 billion each year in research and development. It is this privately-funded effort which has produced the real miracles in health care in this century. Without question, the public health and welfare of our citizens depend on the progress we achieve. This progress is threatened by any system that drains the pharmaceutical industry's fiscal and human resources, whether it is the current jumble of State tort law or a compensation system developed without an adequate analytical foundation.

These are difficult issues, Mr. Chairman, and we look forward to working with you in your consideration of them. Thank you very much for this opportunity.

Mr. Chairman, that concludes my prepared remarks. Dr. Leighton and I will be pleased to answer any questions you and the subcommittee may have.

Senator **Kasten**. Thank you very much.

[The statement referred to follows:]

Statement of Dr. Charles C. Leighton, Vice President for Regulatory Affairs and Research Administration, Merck & Co., Rahway, NJ, on Behalf of the Pharmaceutical Manufacturers Association

THE SAFETY OF DRUGS IN MEDICAL PRACTICE

I. The inherent risk of drugs

The vast majority of drugs in current use are chemicals, mostly synthetic, which are foreign to the human organism. Drugs are prescribed and taken because of their beneficial effect on one or more complex biological systems within the body. In many cases, neither the functioning of these biological systems nor the mechanism of action of the drug is fully understood. All that is usually known for certain is that the drug has a desired effect. Unfortunately, pharmacologic activity generally cannot be confined to the desired therapeutic action and, as a result, virtually all drugs have some unsought pharmacologic or "side" effects which are generally considered undesirable. For example, with anticancer drugs, the rapidly growing cancer cells are slowed, damaged, or destroyed by the drug but inevitably other normal cells are also damaged resulting in a high percentage of patients suffering unwanted effects. While it is well recognized that anticancer drugs are highly toxic, even penicillin and aspirin, considered very safe drugs, can have lethal side effects in certain people.

Drug side effects range from those that are mild and readily accepted, such as the dryness of the mouth encountered with antispasmodics used to treat gastrointestinal symptoms, to those that are serious and potentially life threatening such as disturbances of heart beat or anaphylaxis. Moreover, for many potent drugs for serious conditions there is not a great deal of difference between the dose at which the beneficial effect can be obtained and the dose at which unwanted effects appear. For example, in the case of anticoagulants used extensively in certain types of heart surgery, the physician must determine the proper dosage schedule by weighing the risk of bleeding from over anticoagulating against the risk of clotting through under anticoagulating. Establishing the appropriate benefit-to-risk balance with such drugs can be crucial to the survival of the patient.

Although some adverse effects of drugs are related to the desirable pharmacologic action, other adverse effects of drugs appear to be unrelated to the beneficial pharmacologic effect. Some of these are allergic responses such as the relatively infrequent but sometimes fatal anaphylactic reaction to penicillin. Other side effects are described as "idiosyncratic" because they are neither directly related to the intended pharmacological effect nor classical allergic reactions, but occur in a small percentage of patients for no known reason. Finally there are some drugs, such as antibiotics, which are not intended to affect the patient's body but rather the invading organism. Nonetheless, these drugs can have undesirable effects on the human body such as kidney or hearing damage.

Whether they are called side effects or adverse reactions, unsought pharmacologic, allergic and idiosyncratic reactions are unavoidable concomitants of modern drug therapy. These effects require that physicians weigh the anticipated benefits against the potential adverse effects when prescribing drugs. The balance of risks and benefits is called the Risk/Benefit ratio. This ratio is a fundamental principle of drug therapeutics.

II. The difficulty of determining causation

For a number of reasons, a cause and effect relationship between the administration of a drug and an untoward event is frequently difficult to establish in the individual patient. Few of the symptoms associated with the adverse side effects of drugs are truly unique. For example, vomiting, headaches, and rash occur in the absence of drug therapy and may even be a manifestation of the condition being treated. Concomitant therapy with a variety of drugs or other forms of treatment (e.g., radiation) can complicate the picture further.

In the case of acute, reversible, non-life threatening effects, dechallenge-rechallenge approaches can provide persuasive evidence of causation. But, in many instances, this approach may conflict with legal or ethical considerations or otherwise be inappropriate. And, of course, as to any particular instance, it is limited to the situations where the patient still needs treatment. It cannot be used to establish causation after the fact.

Similarly, while controlled studies can be used to discover the kinds of side effects that a drug may cause, this data does not establish causation in any particular case. For example, a clinical trial may show that a given drug causes headaches in approximately ten percent of users. But if a user suffers a headache, whether the drug or something else caused the headache involves a different determination.

III. The role of the physician

By definition, prescription drugs are those for which adequate directions for use cannot be written for the layman. Therefore, these drugs can legally be dispensed only under the direction of a licensed physician. In most cases, drugs are confined to prescription use because of safety concerns. As a practical matter, only a person with medical training can understand and apply information relating to the drug's indications, dosage and administration, warnings, contraindications and side effects. First, their training is required to determine the patient's condition, which may be crucial to the decision as to which drug, if any, should be used and, if so, how. Second, a physician's skills may well be necessary to detect certain side effects since, at least initially, they may produce no symptoms that the patient would notice or understand. Third, and most importantly, the physician must apply his training and experience to properly weigh, for the particular patient, the likely benefits to be obtained by use of the drug against potential adverse effects. While, in many cases, the patient will participate in that decision making, that is not always possible or the patient's role may necessarily be limited—perhaps by the very illness or injury that the physician is attempting to treat.

IV. Drug development and regulation

Because of the inherent risks associated with prescription drugs, the process of their development is very special, cautious, and done in defined phases. Drugs are only given to humans after careful laboratory evaluation including thorough safety studies in animals. Then, the initial "Phase I" studies in humans are only carried out by recognized experts, usually in an in-patient setting and are closely monitored by the sponsor. Such initial studies require review by the Food and Drug Administration and institutional review boards. Expanded "Phase II and III" clinical testing is carried out in a careful stepwise manner with periodic data reviews by the sponsor's monitors and consultation with FDA.

Once the sponsor of a new drug is satisfied that the drug has an acceptable benefit-to-risk ratio, the sponsor must gain FDA approval before the drug can be prescribed by physicians. Finally, prescription drugs, even when approved for marketing, are subject to constant post-marketing surveillance pursuant to FDA regulations to detect unexpected toxicity so that, if necessary, the labeling can be modified or the drug removed from the market.

This careful, difficult evaluation process takes some 7 to 10 years to carry out and some 60–70% of drugs tested in humans fail to achieve favorable enough benefit-to-risk ratios to justify marketing. In addition, this research and development program now requires an investment of approximately 94 million dollars per drug. Even with this careful testing risks cannot be eliminated. It is for this reason that these products can only be used safely under the supervision of a licensed physician.

The foregoing demonstrates the risk inherent in drug use. The critical importance of the benefit to risk ratio, the unusual difficulty of determining causation, the necessity of the physician intermediary and the cautious step-wise nature of drug development and regulation—all make drugs a very special and unusual group of products.

Senator KASTEN. Our next witness is Mr. Harold Bruns.

Mr. Bruns, who is the president of the Sporting Goods Manufacturing Association, we look forward to your testimony.

Mr. BRUNS. Thank you, Senator.

Howard Bruns of the Sporting Goods Manufacturers Association, and with me is Maria Dennison who runs our Washington operation.

I would like to first acknowledge Senator Danforth who is here. Senator Danforth, last year, was very instrumental in helping get the sporting goods industry's aluminum bat into Japan, one of the hallmark issues. And the aluminum bat, for those of you who are not familiar with it, is one of the rarest of items. It is a vanishing species. It is American-made. And there is a very definite connection between product liability and the vanishing species of American-made, and we will make that connection in a moment.

Our association represents about 80 percent of the sporting goods products manufactured or sold in the United States. We are a $13.5 billion industry at wholesale, $28 billion at retail. The worldwide sporting goods industry is around $50-some billion. The United States represents 40 percent of all sports products sold in the world.

In 1976, before the Senate hearings on this subject, I announced that next year may be the last year of the Super Bowl and the likes of Olga Korbut may never be seen again. Well, I was wrong on those two instances. But we also predicted that the 14 helmet manufacturers that we had that year may not be in existence. And indeed today, 1985, we now have three manufacturers of football helmets in America, and we soon may have none unless we find a solution.

There is no industry that has worked harder to support S. 100, Senator Kasten's good efforts, than we have. And we will continue to do so.

Fifty percent of our products, sports products used by Americans, are made offshore. Yet, we do not see 50 percent of foreign manufacturers in the docket or being sued or under the same pressure that ours are. Why? Well, we are not quite sure. But could it be they are an unreachable risk for the plaintiff attorney? We think so. It is a thought to keep in mind as we look to the future and say we have to have change.

Our U.S. manufacturers pay something like 4 percent for product liability insurance when offshore manufacturers in Japan, Taiwan, Korea, and Europe pay less than one-half of 1 percent. It is difficult to be competitive in the world market with that type of disparity. This makes our goods less competitive. To be in our shoes as manufacturers, you may ask why take the risk, why fight the system? Move your factory offshore and import.

Why change any laws, whether they be tort or systems, as we talk no-fault? Well, the reasons are long and we won't bore you with that. We submitted written testimony that goes into great details on why. And, Senator, we would stand on that written testimony rather than relate it here. But it is essential that we change, no matter what the change is—tort reform, no-fault.

Kasten does a good job in S. 100 of changing the tort system, but we find it particularly interesting, the Dodd and Gorton amendments that lead us toward no-fault. It is not the whole loaf, not even half a loaf; it is two slices and the crust and we think maybe we ought to take a long look at no-fault before we either do more in that way or dispel it. But we do support S. 100 and will continue to do so.

This industry of ours is bleeding, and any tourniquet will do. I would like to read for the record—it is not part of our testimony—a brief paragraph from Jim van Duesen of Bike Athletic, one of the few football helmet manufacturers left:

> In the period of 1980 and 1981, eight suits have been tried against helmet manufacturers and a number of other cases were settled in favor of the plaintiff without court trial. Helmet manufacturers lost four out of eight cases with jury awards of $13.8 million. Out-of-court settlements reached $3 million.

So that is $16.8 million for an industry that is only $20 million in gross sales and earns only $1 million a year.

So if we don't change the system, helmet manufacturers are going to be moving offshore to safer havens, as are a lot more manufacturers that we now have in America.

Also for the record, we would like to submit written testimony from the Dive Equipment Manufacturers Association, Robert L. Gray, if we may submit this without reading it for the record, Senator.

Senator **KASTEN**. Without objection, so ordered.

Mr. **BRUNS**. And we always entertain these hearings with our latest stories of lawsuits, so we won't bore you, but there is one that I heard last week that we find particularly interesting. It is from Diversified Products, one of the largest manufacturers of weight training equipment: There are two inmates on death row in Florida who were trying to body-build and gain some form, and got what they felt was a hernia from lifting and have sued Diversified Products for that.

Now, we might find that entertaining, but we find less entertaining the type of an attorney who may take a suit like that and file it against any manufacturer.

We thank you for hearing us, Senator, and will wait for any questions.

[The statement follows:]

STATEMENT OF HOWARD BRUNS, PRESIDENT, SPORTING GOODS MANUFACTURERS ASSOCIATION

Mr. Chairman. Thank you for providing the Sporting Goods Manufacturers Association with the opportunity to testify today on the Dodd/Gorton amendments to S. 100, the Federal Product Liability Act.

As background, we are a national trade association representing 3,900 producers and distributors of athletic clothing, footwear, and equipment, whose products touch almost every American child and adult in this country. We are a prime example of the choas and confusion served up by the present product liability system; and we are representative of American business and their liability problems, by virtue of the diversity of goods our members produce.

In a nutshell, the sporting goods industry and the entire athletic world is in trouble. We have been receiving at least 2 calls a week, over the past several months, from members who complain that they cannot get their liability insurance coverage renewed, or the rates which are quoted amount to more than 10 times that of 1984, with less coverage offered.

We have a situation where some manufacturers are choosing to go bare, as there is either no coverage available or the coverage is unaffordable. This situation is extremely unhealthy for our companies and bleak for consumers who could suffer injuries. Quite simply, the lack of availability of product liability insurance could put the last nail in the coffin on the chances for survival of school sports.

Apart from an industry going bare, the legal liability that school athletic programs pose for athletic directors, coaches, teachers and school districts, is at a point where many believe the exposure is not worth the risk.

The property and casualty industry's 6 year cycle of billions in underwriting losses, $21 billion alone in 1984, may be the pill that forces Congress to correct a tort system gone haywire, if it does not want to see the bankrupting of American industry. The underlying reason for the insurance industry's financial troubles are the out-of-court settlements and huge jury awards set in motion by a legal system that has thrown the doctrines of negligence and fault out the court room door.

Let me explain the product liability problems specific to the sporting goods industry. In the majority of cases, product liability actions are based in 'failure to warn or instruct'. Years ago, manufacturers did not have to place warnings on athletic equipment, as it was established in both law and common knowledge, that playing contact sports involved risk. With the development of strict liability theories, manufacturers were instructed that they had a duty to warn of products that are inherently dangerous and where the risks are not obvious to the consumer. We conformed to those instructions, even though our products are not inherently dangerous.

It is the activity, not the product, in the majority of instances, that causes injury. Be that as it may, court cases, today, revolve around whether the warning given was adequate. There has been no scientific standard developed to determine what constitutes an adequate warning. Yet, the basis of a plaintiff attorney's suit in a product liability action against the sporting goods industry is lack of an adequate warning or failure to instruct properly. When a jury sits opposite a catastrophically injured player in the court room, you tell me whether the group of 12 is likely to decide whether warnings or instructions were 'adequate'.

Secondly, the manufacturer has no control over his product once it leaves the factory. The retailer, distributor, school coach, or anyone else, can take the product out of its packaging, use or discard the instructions, and decide whether or not to provide detailed warnings on the risks involved in playing sports. Even if they take every precaution, this does not mean that the user of the product or his/her parents, reads, listens, understands, or cares about the elements of risk.

The majority of time, the sport participant just wants to go out and play. And, if he or she is competitive, winning dominates actions they'll take on the playing field, even though our schools and youth sports organizations provide guidebooks, films, and teaching clinics on sports safety.

Why then is it the manufacturer who is liable for an injury, and, under today's system, a target for revenge?

If we take a claim that is built around design defect, we have the juries in America deciding whether a technically constructed product was designed the best that it could be. In essence, the product is redesigned in the court room, where plaintiff expert witnesses can Monday morning quarterback a company's R&D procedures, its testing and state of the art at the time of manufacture.

If this is the litigation system that is to continue, then we applaud all efforts in the direction of a no-fault compensation scheme. If there are to be no specific standards of negligence, then let's write away the tort alternative in the Dodd and Gorton proposals, and provide a compensation system that would require any injury suffered in using a product to be compensated by the manufacturer of that product.

Let's develop a system as the Europeans have, that puts a value on the loss of a bodily function. We, in the sporting goods industry, would gladly accept such an approach. The insurance industry should be able to provide fixed price coverage under such a plan. And, the injured party would be compensated expediently and understand the compensation. The only parties who probably wouldn't be happy are the trial lawyers who would lose their self-employment plan. If a person is catastrophically injured, then a schedule needs to be developed that provides an annuity for life. The problem of providing lost wages to injured athletes bothers us, however. How does one calculate a tennager's earning potential that is translatable to the long term?

For a moment, however, let me come back to the provisions in the Dodd/Gorton amendments. I would like to speak specifically to the Dodd amendment, as we perceive the language and concepts more workable than Senator Gorton's.

First, Dodd's definition of 'unsafe' is too vague, and appears interchangeable with the words 'unreasonably dangerous', which have not been defined in the language. Secondly, the bill provides no guidelines as to whether a manufacturer's products cause harm. Senator Kasten's bill is much better in this regards. Third, if the concern is to provide for people injured while using products, but who can't prove which product was used, then how do you prove that the manufacturer whom the person has chosen to sue produced an unsafe product?

This thesis appears to be a major tenet of the Dodd bill. Fourth, the bill allows the claimant to go venue shopping. There are no subpoena powers outside a 100 mile limit. Therefore, if the injury occurred 3,000 miles away from where the claim is filed, how does a defendant prepare his defense? Fact witnesses, crucial to building a case, cannot be subpoenaed more than 100 miles. On the other hand, in Section 207 of Title II, the manufacturer can seek reimbursement from others in the commercial chain, only in the state in which the injury occurred.

Logic would move that a product liability claim should only be allowed to be initiated where the injury happened in all circumstances. If I may go one step further, it is ludicrous to believe that a manufacturer who truly believes his product did not cause harm will go after and sue his distributor, retailer or coach. These are his customers, his livelihood. The manufacturer, regardless of being the 'innocent victim' in a set of circumstances, will absorb all costs.

Fifth, if a principal concern of the bill is to protect people that are harmed and do not know it, then the bill should say that. The ability to allow a person to take action against a manufacturer once they know the harm and its cause, allows suits to be filed years and years after the accident occurred. Defense becomes impossible for our industry, under these circumstances.

If the concern, however, is for those injuries caused by pharmaceuticals and environmental chemicals, then the provision for knowing both harm and its cause should be applied only to latent injuries or illnesses: It should not be broad-brush.

Language in Section 204(b) of Title II should be changed to provide that a claimant must bring a suit, rather than a claim, within 3 years of having dicovered an injury.

I do not understand the rationale for Section 206(e), under Title II. By providing the claimant the ability to recover damages within three years after the date of the manufacturer's payment for economic harm, the manufacturer is encouraged to provide a fixed payout, immediately, rather than a long-term payout of benefits, which serves the injured party in a more rational way. Also, the present language prolongs a manufacturer's exposure to the possibility of dispute or litigation.

Section 301 of Title III, states that a manufacturer is liable under this title if the claimant establishes that the injury complained of was the result of the failure of the manufacturer to exercise reasonable prudence. Who decides what constitutes reasonable prudence? My definition of reasonable prudence may be in conflict with your definition, as to what society requires of its members for the protection of their own interests and the interests of others.

Finally, I would suggest that the language of Section 303—The Responsibility of Product Sellers—include that foreign manufacturers be held liable and subject to service of process; and show proof of ability to pay. Many product sellers could be forced out-of-business if plaintiffs could not enforce judgements against a foreign manufacturer, even more so now, with the increase of counterfeit product being imported into this country.

In closing, a survey of our manufacturers has found that the product liability premium in 1985 accounts for as high as 65% of total sales for one manufacturer, compared to 13% in 1984. On average, the cost of liability insurance as a percentage of sales is running about 20% in some segments.

In the end, the American consumer pays these costs—either through higher prices or lost jobs. We don't have to worry about EPA eliminating the smokestacks of America. The tort system, as interpreted by judges, is guaranteeing the elimination of America's ability to do business and to stay in business.

Thank you, Mr. Chairman. I would be happy to answer any questions.

Senator KASTEN. Mr. Bruns, thank you for your testimony and I think all of us understand the point that you are making, and that is the problem is getting worse and worse and worse and some kind of a legislative solution is absolutely demanded at this particular time.

Our next witness is Mr. James Mack, the public affairs director of the National Machine Tool Builders Association.

Mr. Mack.

Mr. MACK. Thank you, Mr. Chairman.

Three months ago we appeared before this committee and urged your approval of legislation which we believe would clean up some of the product liability mess with the enactment of fair and balanced Federal standards for the litigation of product liability claims. That legislation had been developed under your leadership, Senator Kasten, and was the product of several years of skillful compromise.

However, action on it was deemed inappropriate until other mechanisms could be studied. As political realists, we accept that decision and so we are back before you today. We will not go away because the problem will not go away. The confusion, the unfairness, and the waste of resources which impelled us into action 10 years ago still remain. If anything, they have gotten worse, and the spectre of insurance unaffordability which confronted our small- and medium-sized members in the mid-1970's has returned to haunt them again in the mid-1980's.

We are not sure whether an agreement or a consensus can be forged in which claimants could be offered a choice of remedies for injuries caused by allegedly defective products, but we are determined to try. The alternative to trying would be to surrender to waste and to confusion and to gamble the future of our members' companies in an environment in which geography is more determinative than justice; in which insurance would become ultimately unobtainable; in which claimants would continue to be victimized by a lottery; and in which lawyers would be the principal, if not the only winners.

The tort component of the ideal product liability system should function as a true fault-based system. These negligence rules should be established as Federal standards so that uniform fairness and justice can be dispensed in all product liability court actions, no matter where they are brought; and so that claimants and manufacturers and insurers will be provided the certainty that they currently are so demonstrably lacking.

Many compromises were added over time to the tough negligence standards in the legislation originally introduced by Senator Kasten in 1982. If an alternative mechanism is provided to permit claimants to recover their uncompensated economic losses, these compromises which had the effect of "watering down" the negligence standard and arguably made it somewhat confusing, would no longer be necessary.

Equally as important is the fact that if the only practical difference between the tort and alternate claims mechanisms is the level of damages to be paid, then the goal of reducing litigation and thus transaction costs will never be achieved.

So our first suggestion would be to establish simpler, tougher, fault-based Federal standards for litigation brought in the tort system.

Second, both the tort and alternative claims systems should remedy the scandals associated with the practice of subrogating worker compensation benefits against our members and other suppliers of workplace products. Because Senator Gorton's proposal provides neither Federal standards (and thus a uniform fault-based system) under the tort component nor for subrogation reform under either system, we must reluctantly reject his approach.

Senator Dodd's amendment does, however, offer a conceptual framework within which we believe consensus may be possible. It also provides an irrevocable election between the tort and alternative claims remedy and it encompasses the concept of net economic loss under the alternative claims component. Both these elements are, we believe, essential to achieving consensus.

The willingness of our members to accept some form of alternative remedy based on net economic loss as the price of achieving fundamental tort reform, is admittedly made easier by the fact that we make products which give rise to claims based exclusively on traumatic injuries arising in the workplace and for which worker compensation benefits are invariably available.

Thus, in a sense, we represent a relatively easy object of consensus.

We recognize that for producers and consumers of other products, particularly those causing latent harms, consensus may be more difficult to achieve. The committee may find it impossible to construct a generic alternative claims system to cover all products. It may well be necessary to construct different types of remedies with varying elements of access and varying degrees and elements of proof of causation in order to adequately cover all products in ways that are fair to both claimants and to manufacturers.

Our written testimony makes a number of positive suggestions for the improvement of Senator Dodd's proposal. For example, substantial wasted resources could be saved if a 25-year absolute statute of repose were to be applied to all workplace traumatic injuries under both systems.

Mr. Chairman, we appreicate the opportunity to once again communicate our views to this committee. We commend you for your leadership, your steadfastness and your willingness to achieve consensus. We are, subject to the reservations and conditions outlined in our written testimony, prepared to accept a product liability reform bill that would include both a tort and an alternative net economic loss component.

We recognize that other types of products do not lend themselves quite so readily to so neat a packet. We stand ready to work with you and others in the Senate in your efforts to foster a consensus that will provide certainty, uniformity, fairness, and efficiency to the resolution of product liability claims.

The stakes are high. The benefits of success are great. But the cost of failure would be even greater, both for persons who make or sell and persons who consumre or use the products of American industry.

Thank you.

[The statement follows:]

STATEMENT OF JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION

Good morning, my name is James H. Mack. I am Public Affairs Director for the National Machine Tool Builders' Association (NMTBA), a national trade association representing companies which account for more than 85% of domestic machine tool production. The industry represents a small but strategic segment of the nation's industrial capacity. The vast majority of machine tool manufacturers are small businesses.

Since 1975, NMTBA has urged the Congress to reform the product liability system, which fosters confusion, unfairness, and wasteful transaction costs; which serves as a cruel lottery for both claimants and manufacturers, providing high rewards for some and economic deprivation for others, depending more upon geography than justice; and which, as a general rule, provides enrichment primarily for lawyers on both sides of the counsel table.

Three months ago, we appeared before this Committee and urged your approval of legislation which we believed would clean up some of the product liability mess through the enactment of fair and balanced federal standards for the litigation of product liability claims. That legislation had been developed under your leadership, Senator Kasten, and was the product of years of skillful compromise. However, action on it was deemed inappropriate until other mechanisms could be studied.

As political realists, we accept that decision. And so we are back before you today. We will not go away, because the problem will not go away. The confusion, the unfairness, and the waste of resources which impelled us into action ten years ago still remain. If anything, they have gotten worse. And the spectre of insurance unaffordability which confronted our small and medium-sized members in the mid-seventies has returned to haunt them again in the mid-eighties.

We are not sure whether an agreement or consensus can be forged in which claimants could be offered a choice of potential remedies for injuries caused by allegedly defective products. But we are determined to try. The alternative to trying would be to surrender to waste, to confusion, and to injustice; and to gamble the future of our members' companies in an environment in which insurance would become ultimately unobtainable, in which claimants would continue to be victimized by a lottery, and in which lawyers would be the principal—if not the only—winners.

It is in this spirit that we offer these comments on the various proposals which have been advanced thus far in the process and which are before you today.

First, the tort component of the product liability system should function as a true fault-based system. It should look to the conduct of the manufacturer, and if that conduct was negligent, the manufacturer should pay full damages, including pain and suffering, for the claimant's harm. These negligence rules should be established as federal standards, so that uniform fairness and justice can be dispensed in all product liability tort actions, no matter where they are brought; and so that claimants, manufacturers, and insurers will be provided the certainty they are currently so demonstrably lacking.

Many compromises were added time to the tough negligence standards in the legislation originally introduced by Senator Kasten in 1982. These provisions were added, because some believed that, in their absence, innocent claimants—whose claims might have had some merit—would have been left without a remedy. If an alternative mechanism is provided to permit claimants to recover their uncompensated economic losses, these compromises, which had the effect of "watering down" the negligence standard and arguably made it somewhat confusing, would no longer be necessary.

Equally as important is the fact that, if the only practical difference between the tort and alternate claims mechanisms is the level of damages to be paid, the objective of reducing litigation (and thus transaction costs) will never be achieved. Why would any claimant opt for the faster, more efficient claims system, if he or she can just as easily access the tort system and collect higher damages by meeting roughly the same burden of proof as under the claims system?

So our first suggestion would be to establish simpler, tougher fault-based federal standards for litigation brought in the tort system.

Secondly, both the tort and alternative claims systems should remedy the scandals associated with the practice of subrogating workers' compensation benefits against our members and other suppliers of workplace products. We have denounced these inequities in past testimony before this Committee, and, rather than repeating those comments here, we refer the Committee to Pages 16–25 of our March 21, 1985 statement.

We would point out, however, that, at least as far as traumatic injuries occurring in the workplace, we believe that Section 10 of S. 100 is vastly preferable to the provision in Senator Dodd's proposal which would require our members to "chase" employers for reimbursement of funds provided to claimants when a final disposition of workers' compensation benefits has not occurred prior to the filing of the product liability claim. Typically workers' compensation claims involving traumatic injuries are pursued and resolved relatively quickly. Thus, if a justification exists for paying full product-related economic losses prior to adjudication of a workers' compensation claim, it exists only in cases involving latent harms. No such justification exists in cases involving traumatic injuries.

Because Senator Gorton's proposal provides neither federal standards (and thus a uniform fault-based system) under the tort component nor for subrogation reform under either system, we must reluctantly reject his amendment to S. 100.

Senator Dodd's amendment does, however, offer a conceptual framework within which we believe consensus may be possible. It does provide for a federal negligence standard (albeit unduly abbreviated) under the tort component, and it does provide a measure of subrogation reform.

It also provides an irrevocable election between the tort and alternative claims remedies; and it encompasses the concept of net-economic loss under the alternative claims component. Both of these elements are, we believe, essential to achieving consensus.

An election of remedies which did not ultimately preclude the subsequent election of another remedy would, we believe, lead inevitably to duplicative and endless litigation. And the ability of claimants to collect from manufactures under the claims component either previously compensated economic losses or damages for pain and suffering would be likely to result in a high percentage of contested claims and a resultant heavy increase in transaction costs. A system, therefore, which did not contain a binding election of remedies and which did not limit damages under the alternative claims component to net economic loss would be unacceptable to our members. The bill should clarify that workers' compensation benefits are to be deducted from the manufacturer's liability for excess economic loss under the claims system. The provision permitting the collection by claimants of additional economic loss—after a disposition of the original claim—should apply only to medical and rehabilitation expenses and not to other types of economic loss. (Senator Dodd has already provided for such a limitation where the manufacturer voluntarily agrees to the claim.)

The willingness of our members to accept some form of alternative remedy based on net economic loss as the "price" of achieving fundamental tort reform is admittedly made easier by the fact that they make products which give rise to claims based exclusively on traumatic injuries occurring in the workplace and for which workers' compensation benefits are invariably available. Thus, in a sense, we represent a relatively "easy" object of consensus.

We recognize that for producers and consumers of other products (particularly those causing latent harms), consensus may be more difficult to achieve—if indeed "difficult" is not too mild a word to use in describing the potential for conflict and controversy. The Committee may find it impossible to construct a generic alternative claims system to cover all products. It may well be necessary to construct different types of remedies with varying elements of access and varying degrees and elements of proof of causation in order to adequately cover all products in ways that are fair to both claimants and manufacturers. The issues of "inherent characteristics" and "unavoidably unsafe products" (where risks are both known to and warned of by the manufacturer) are but two of the more difficult questions which are not adequately addressed in either of the proposals which have been advanced thus far. We hope that the Committee and the interested parties will be able to achieve a consensus on these and similar issues. It is obvious that no such consensus exists today.

Perhaps the most difficult task facing the Committee is to identify what constitutes a compensable event giving rise to a valid claim under the alternative system. We believe that claimants should be required, at a minimum, to establish their own "innocence"—that "unreasonable use" of a product should be clearly defined, consistent with the concept of conduct "reasonably anticipated" by the manufacturer. Claims should be excluded if the claimant knew or should have known the product was unreasonably dangerous and voluntarily and unreasonably used it anyway. The term "unreasonably dangerous" should be defined. We believe that language should be added to the Dodd amendment clarifying that workers' compensation claims against employers are not intended to be eligible for access to either the tort or alternative claims system.

In addition, it must be made clear that the compensable event involves an injury caused by a product which is unsafe. Mere contact or involvement with a product which was not being used in a manner which was or should have been reasonably anticipated by the manufacturer should not permit access to the system. We also urge the inclusion of a minimum floor on claims, so as to prevent the filing of nuisance claims. Although the minimum floor could take the form of a dollar amount, this could lead to inflated damage claims in order to satisfy its requirement. Therefore, we believe that a non-monetary expression would be preferable—perhaps a requirement that the claimant's harm constitute the "loss of or loss of use of a member or function of the body or serious disfigurement."

The procedure for filing claims and the information required of claimants in their filing should be more thoroughly detailed.

Finally, we believe that the statute-of-repose for capital goods (with exceptions for latent harms and cases of fraud) provided in Section 11 of S. 100 should be applied to both the tort and alternative claims components. We have always looked at the statute-of-repose in the context of transaction-cost reduction. It is a rare case indeed when an overage capital good is the subject of a successful product liability lawsuit involving a traumatic injury. Because our suggestion involves only capital goods, the claimant would receive workers' compensation, which under both the tort and claims components (and under current law) would be deducted from his or her award. Our members are constantly being called upon to expend precious resources to defend lawsuits involving overage products in litigation, which they invariably win (although the expenditure of substantial transaction costs in lawsuits of dubious merit stretches, somewhat beyond normal usage, the definition of the term "winning"). Substantial wasted resources would be saved if a 25 year absolute statute-of-repose were to be applied to all workplace traumatic injuries. Our own survey data indicate that 31% of our claims—virtually none of which result in the claimant receiving an award beyond his or her workers' compensation benefits, but all of which result in the expenditure of transaction costs—would be eliminated.

Mr. Chairman, we appreciate the opportunity to once again communicate our views to this Committee. We commend you for your leadership, your steadfastness, and your willingness to achieve consensus. We are—subject to the reservations and conditions outlined in our testimony—prepared to accept a product liability reform bill that would include both a tort and an alternative net economic loss claims component. We recognize that other types of products do not lend themselves quite so readily to so "neat" a package.

We stand ready to work with you and others in the Senate in your efforts to foster a consensus that will provide certainty, uniformity, fairness, and efficiency to the resolution of product liability claims. The stakes are high. The benefits of success are great. And the cost of failure would be even greater—both for persons who make or sell and persons who consume or use the products of American industry.

Senator KASTEN. Mr. Mack, thank you.

I am particularly interested in your last statement, saying that you are willing to work with us and the people that you represent are willing to work with us toward essentially the bill similar to S. 100, along with some kind of a compensation, some kind of a system for compensation or a net economic loss component.

I wonder, Mr. Bruns, is that the same for your organization? Are you and the people that you are representing here today willing to work with us toward a compensation or a net economic loss component in addition to the tort reform that we have been working on?

Mr. BRUNS. Yes.

Senator KASTEN. And, Mr. Mossinghoff, is that the same situation for you and the people that you represent?

Mr. MOSSINGHOFF. Yes, Mr. Chairman. We would be pleased to work with you, as we have in the past. We do think, as the testimony has indicated this morning, that we really do present a unique kind of situation that needs to be addressed.

As I indicated, we already have a study group including risk managers. We would be pleased to feed the results of that into the committee's deliberations.

Senator KASTEN. Dr. Leighton, Mr. Mossinghoff has argued that drugs should be treated differently. He made that point.

Could you just very briefly elaborate on that? In other words, I guess we are particularly concerned about the issue of the special side effects problems that drugs might have.

Dr. LEIGHTON. Yes. It is a general principle of drug therapeutics that the physician, in prescribing drugs, must weigh benefits against risks. And over the long history of medical science, it has generally been shown that when drugs have great benefits, they have also inherent risks.

I would like to give you two examples which I am sure will be familiar to most people. They are the anticancer drugs and the anticoagulants. In the case of anticancer drugs, they are designed to destroy the cancer cells, but inevitably they produce a large degree of toxicity because they also affect normal cells. This is just an inherent characteristic of current anticancer therapy today.

And the second example I would like to give are the use of anticoagulants, drugs which reduce the coagulating property of the blood. They must be used with a careful estimate of their risk/benefit. That is, you want to produce enough effect from the drug so that you reduce the blood's ability to coagulate, but you don't produce bleeding. If you do not give enough, of course, you do not get the therapeutic benefit you intended. And these anticoagulants are very important in today's modern cardiovascular surgery.

So, in summary, drugs have inherent risks. And they have to be balanced by the physician, when he prescribes a drug, with the benefits.

Senator KASTEN. It is the measles vaccine, isn't it, that we are now down to either one or two manufacturers? Would that be an example? We know that it works for what, 1 out of every 10 million or 1 out of every 5 million? It works for everyone and there is that one problem.

Are you familiar with it? I don't mean the details of it, but just in general, describe the problem that we have found ourselves in there. We are down to one manufacturer; am I correct on that?

Dr. LEIGHTON. I don't know how many manufacturers there are, but the problem is pretty much the same as I just described, and that is you have a tremendous benefit, the prevention of measles which—well, there are two kinds of measles vaccines, both what we call regular measles and German measles. And in both cases they are designed for public health purposes to reduce the suffering that goes along with these diseases. However, in a very small number of children, they produce or appear to produce serious side effects, and there seems to be no way to get away from that. Every vaccine that has ever been produced, including the smallpox vaccine, has a low incidence of risk. And this obviously is an exposure and a concern. And people work very hard to make the vaccines as low-risk as possible, but we will never have a vaccine that has no risk.

Senator KASTEN. Senator Danforth.

The CHAIRMAN. Mr. Chairman, I have no questions, but I appreciate the commitment on the part of this panel, working toward a bill that we can pass. I think you have stated in your testimony that we have tried the Kasten bill. We were not able to report it out of committee. We had a tie vote.

If there is any chance at all of getting legislation enacted, we are going to have to have a compensation program as part of the overall plan. Therefore, if we want some greater uniformity in the tort system, a necessary component of the package is going to be a compensation plan.

So I would encourage you to continue your efforts. Thank you very much.

Senator KASTEN. I, too, would like to thank all of you for your statements. We look forward to working with you. And I also thank you for your statement of cooperation as we work our way through this very complex and difficult area.

Thank you very much.

The next panel is Mr. Feinberg and Mr. Goldberg.

[Pause.]

Senator KASTEN. The committee will come to order. Our next panel is Mr. Feinberg and Mr. Goldberg. The first witness is Kenneth R. Feinberg, special settlement master, agent orange product liability litigation.

Mr. Feinberg.

STATEMENT OF KENNETH R. FEINBERG, ATTORNEY, SPECIAL SETTLEMENT MASTER, AGENT ORANGE PRODUCT LIABILITY LITIGATION, AND MICHAEL L. GOLDBERG, ATTORNEY

Mr. FEINBERG. Thank you very much, Senator. I am pleased to be here. I note historian McCauley's definition of a lawyer: somebody who in 10 minutes can delve into the very depths of the superficial.

I have 5 minutes, so we will see how I do.

I am here today in my capacity as special settlement master in the agent orange case. I do not represent plaintiffs or defendants. I am here to explain my views and how they have been colored by the agent orange litigation which, as you know, was settled on the eve of trial in May of 1984. Seven chemical companies paid $180 million, the largest tort settlement award in history, to some 2½ million class members, and I am now in the process—the difficult process—of trying to implement that settlement to award the money to eligible claimants.

I have learned two lessons from agent orange. First, the traditional tort system is a miserable failure in mass disaster cases. Problems of causation, problems of latency of disease, long courtroom delays, transactional costs, and so forth. One estimate is that the chemical companies spent $100 million getting ready for trial in the agent orange litigation. And the asbestos litigation, as you know, the Rand Corp. estimates that of the billion dollars spent so far, $630 million has gone to lawyers and expert witnesses—63 cents of every dollar.

The system has broken down terribly in these mass disaster cases.

The second lesson I have learned from agent orange is that there is no one product liability crisis. There are a series of crises, depending on the nature of the product, the claimant, the company. And I believe that one will find both substantive difficulty, and a good deal of political difficulty, in trying to fashion one overall comprehensive solution to what is really to me a series of crises.

As H.L. Mencken once said, for every complex problem in society there is a simple, comprehensive, single solution—that is wrong. And I would caution the committee to avoid trying to fashion one overall solution to the product liability crisis.

What I would propose for the committee's consideration is a voluntary alternative system to tort for those plaintiffs and defendants who wish to participate. The Dodd-Gorton proposals are, I think, a valuable step in the right direction. But I would go beyond those proposals and create a truly voluntary system for both the defendant company and the plaintiff claimant who elect to go into a new alternat,ve system benefiting from important legislatively mandated incentives and disincentives.

For the company, the defendant, I think there are real advantages to my proposed approach. It will pick and choose where it wants to enter an alternative system. There will be a cap on recovery along the lines suggested by Dodd-Gorton. It will avoid a good deal of the transactional costs.

If it elects to come into an alternative system, and the plaintiff elects not to come into the new system, I suggest that the tort system should prohibit any strict liability concept. I believe that such a system of election would provide companies with the stability and the predictability that they currently lack.

From the consumer's perspective, from the plaintiff's perspective, I think there are also real advantages to an alternative system. First, if the plaintiff is convinced that there has been truly egregious conduct on the part of the defendant, let the plaintiff opt for the traditional tort system, with punitive damages. The plaintiff makes the election.

If he decides to opt in, however, to a new system, I would propose absolute liability on the part of the defendant manufacturer. I would go even further than Senator Dodd and say that if a plaintiff and a defendant mutually elect to go to an alternative system, the only issues should be diagnosis of injury and causation. And, even as to causation, the defendant company opting in may decide to award claims as a far better alternative than staying in the traditional tort system.

Limited transactional costs for the plaintiff, prompt payment to the plaintiff. Let us say within 160 days, a check would be sent to the plaintiff who opts in and satisfies the prerequisites for recovery.

I want to emphasize the argument made about deterrence. If the plaintiff consumer is convinced that the defendant company really has been negligent or reckless, give that plaintiff the option of staying in the traditional tort system.

There should also be legislatively prescribed disincentives. No strict liability in tort if the plaintiff refuses to elect and the defendant company does. But punitive damages, if the defendant acts in bad faith in terms of this new system, and maybe attorneys' fees should be awarded accordingly in such a case of bad faith.

Finally, Mr. Chairman, let me suggest a philosophic point, if I may, based on my experience in the agent orange case. I think it is terribly shortsighted for plaintiffs and defendants not to be looking for an alternative to the existing tort system. I do not believe that the existing system can continue to function much longer without extracting a very heavy price on the plaintiff who has to wait for recovery, and for the defendant who may end up as Manville did in chapter XI.

I am prepared to work with the committee in any way the committee sees fit. I have prepared a more comprehensive statement that explains in some detail how my proposal would vary somewhat from the Dodd-Gorton proposals. I am pleased to be here and thank the committee very much.

Senator **Kasten**. We thank you very much.

[The statement follows:]

Statement of Kenneth R. Feinberg, Attorney, Special Settlement Master in the Agent Orange Product Liability Litigation

I am pleased to be here today to testify concerning the subject of product liability reform. The issue is, of course, an important one and I can do no more than offer additional comments to the detailed record developed by this Committee over the past few years. Reasonable people may differ concerning the best way to combat the surging flood of product liability claims; but it seems to me too late in the day to maintain that there is no product liability litigation crisis. From my vantage point, I see the issue as trying to get a handle on the best way to meet that crisis.

My testimony today is based primarily on my recent experiences as the Special Settlement Master in the Agent Orange Product Liability litigation. This mass tort litigation—involving a class of some two and one-half million people, seven defendant chemical companies and the United States Government—was settled on the eve of trial in May of 1984.

I was appointed by Chief Judge Jack B. Weinstein in April of 1984 to perform three distinct tasks:

1. To facilitate a settlement between the plaintiff class, the defendant chemical companies and the United States Government. This phase of my work was largely successful. The case between the Vietnam veteran class members and the chemical companies was settled for $180 million. Unfortunately, the United States Government refused to participate in the settlement. The case against it was subsequently dismissed.

2. To develop a Plan for the distribution of the settlement fund. In February of 1985, I submitted to the Court a proposed plan for the distribution of the $180 million settlement fund to eligible members of the plaintiff class. On May 28, 1985, the Court, after certain modifications of my submission, approved the Distribution Plan and authorized me to implement the Plan.

3. To implement the Distribution Plan. In its recent Opinion, the Court reappointed me as Special Master with instructions to implement the court-approved Distribution Plan. I am currently engaged in securing the necessary persons and institutions to implement the Plan so that the settlement fund can be distributed to eligible members of the class as soon as all legal appeals have been exhausted. This should occur some time early next year.

My role as Special Master in the agent orange litigation, as well as my ongoing involvement with various aspects of the asbestos problem, and my participation as a member of the ABA Ad Hoc Committee on Tort Law Reform, have taught me a few salient lessons about the subject of product liability reform.

One conclusion I have drawn, however, transcends all others—that the existing tort system simply does not work when it comes to mass tort disasters.

A second important lesson that I offer to this Committee as a result of my experience is that there is no one "product liability crisis" and that it is wishful thinking to attempt to articulate one all-encompassing product liability reform solution. Instead, what we confront is a series of situations where the tort system has broken down and where our traditional adversarial legal system is no longer equipped to offer a just, efficient and effective resolution of disputes.

Although the nature and degree of the product liability crisis may vary, this Committee has well documented the existing problems which confront the traditional tort system:

1. Inconclusive evidence of causation. The task of establishing causation is a particularly acute problem when it comes to toxic substances. Many diseases caused by a toxic material are also caused by other environmental or nonenvironmental factors. It is often difficult or impossible to distinguish chemical-related disease from the normal background incidence of the same kind of disease, or to determine whether the exposure resulted in any adverse health impact at all.

This poses the fundamental question of whether the traditional tort system is equipped to decide cases involving claims of disease allegedly caused by exposure to hazardous substances. Is the state-of-the-art sufficient to demonstrate a causal nexus between the exposure and the disease; what about intervening or multiple causes; which defendant should be deemed the primary offender; what about contributory negligence? These and other causation questions raise doubts about the ability of the traditional tort system to resolve damage claims arising out of exposure to hazardous susbstances.

2. Long latency periods; developing scientific knowledge of risk. In many cases, years or decades elapse between exposure to a toxic material and manifestation of disease. Frequently, as exemplified by asbestos, much more is known about risks when the medical problems start to arise then when the products or wastes were produced and the bulk of exposure took place. To compound this situation, contaminants can now be detected at increasingly small concentrations.

3. Multiple plaintiffs and multiple defendants. The product liability crisis may involve hundreds or sometimes even millions of individuals, each of whom may claim harm from products produced by a number of different companies. One of the ironic features of the tort problem is that the social utility of a particular product may actually increase the danger that pervasive use will result in millions of potential tort claims.

4. Public expectation of compensation for all risks. There is growing public sense that companies should provide compensation to the public for as many risks as possible.

5. Enormous, unpredictable liabilities. With a large number of exposed individuals, rapidly developing scientific knowledge, and varied and changing legal rules of liability, companies can be subject to enormous unanticipated risks. Due to the enormous variation from state-to-state as to what constitutes an unsafe product, and at what point firms will be held liable for such products, plus the uneven application of such standards from case-to-case, the tort recovery method has become more of a crapshoot than an evenhanded compensation system. A relatively few injured people get very large awards, while most receive little or nothing. This inconsistency is not only inequitable to injured consumers, but detrimental to all society; uncertain and unclear application of the law diminishes the incentive of firms to act in a prudent manner when manufacturing or selling consumer products.

The law also places unjust and excessive burdens on manufacturers and product sellers. This occurs in states that recognize strict liability in tort. In these states the plaintiff must only prove that the product is unreasonably dangerous; if he does, the defendant firm is liable for all damages. To hold non-negligent firms that have acted in a reasonable manner fully liable—a consequence that may result in bankruptcy—appears to me to raise serious questions of fairness.

6. Insurance problems. Companies may have inadequate insurance coverage, or may find that insurance companies seek to deny coverage on various technical grounds. The result may be massive lawsuits over such coverage. (One massive San Francisco litigation involves over 100 attorneys in a $5 billion lawsuit between five asbestos manufacturers and more than 65 asbestos insurers).

7. Very high transaction costs. Because of the multiple parties, intractable scientific issues, and massive insurance disputes, expenses of litigation are enormous. The Rand Corporation has estimated that of every dollar spent on asbestos claims by manufacturers and insurers, injured workers receive only 37 cents. Thus, of the over $1 billion in compensation and litigation expenses that has been spent on asbestos claims, fully 630 million dollars have gone to attorneys and others who thrive from the present litigation.

8. Difficulty in obtaining compensation for some injuries. Where there is a relatively small increase in the incidence of disease over a relatively large background level, individual claimants may be unable to meet the traditional burden of proof. Also, those with relatively minor injuries may be economically unable to obtain the legal representation needed for access to the courts.

9. High costs, delays, and erratic results. The inefficiencies of the tort system consume a large share of any award—primarily for legal and expert witness fees and expenses—and years may go by before claimants can obtain compensation. Due to unpredictable jury awards, some claimants may be handsomely rewarded, while equally meritorious claimants receive little or nothing. More specifically, many claimants who warrant compensation are left unprotected by current law. These include those injured by unavoidably unsafe products, those injured by unreasonably dangerous products in states which do not recognize strict liability, and those who cannot identify the particular manufacturer of the harm causing product and who reside in states which do not recognize joint enterprise or market share notions.

Ultimately, Mr. Chairman, those claimants most at risk are those who will suffer future injuries. As I have already emphasized, existing tort litigation often diverts both financial resources and attention from business operations whose continuity is essential for the payment of these claims. If the present situation continues, and if the assets of companies continue to erode, firms may not be in existence to pick up the tab for these future claimants.

10. Burdens on the court system. Large and complex toxic tort litigation can clog the courts and increase the costs of court administration. The magnitude of the problem is illustrated by the massive trial in San Francisco to which I have already referred. A $210,000 renovation had to be done on a special auditorium merely to accommodate all the lawyers and other participants—all of whom are being paid with dollars that could be better spent by compensating the victims.

11. Burden on public sources of compensation. To the extent legitimate claims go unpaid due to the delays and inefficiencies of the tort system, or due to eventual depletion of corporate assets, injured claimants are forced to turn to public sources for care and support.

12. Disincentives for constructive action. In addition to being slow and expensive, and choosing the wrong people to compensate and reject, the present compensation system has the grave defect of inhibiting socially sound action by the threat of post hoc risk assessments having little relation to society's overall needs. Inhibition of production of useful vaccines is one recent newsworthy example.

The real issues are who should pay for some of the larger risks of living in a modern industrial-technical society and how much; to whom should payment be made; and how distribution of compensation should be made.

Mr. Chairman, in seeking a solution to the product liability crisis, it is important to keep in mind that the nature of the solution depends upon a determination as to exactly what is the problem. As already indicated, I do not believe that it is substantively sound policy—or politically feasible—to try and develop a single all-encompassing solution for the product liability dilemma. The problems surrounding Agent Orange, for example, are not ony different from those of trumatic injury, they are also different in very important respects from asbestos. True, both suffer from the problem of run-away transactional costs and unconscionable delays in compensating worth victims. The latency of diseases allegedly caused by Agent Orange and asbestos is also similar in both cases. But the Agent Orange case raises thorny problems of causation that are absent in much of the asbestos litigation.

The asbestos crisis, in turn, is certainly far different in most respects from the problems associated with traumatic injuries allegedly caused by defective machine tools or athletic equipment.

I believe that the product liability reform effort undertaken by this Committee should focus more on procedures for resolving product liability tort disputes than on the largely ephemeral search for comprehensive changes in substantive tort law. I suggest that this Committee should be focusing on alternative dispute resolution mechanisms to the existing tort law, alternatives that will permit all of the parties—plaintiffs, defendants and the interested public—to deal with the various and sundry tort crises as they arise.

This is why the proposals of Senator Dodd and Senator Gorton are important steps in the right direction. Both proposals attempt to create an alternative system for resolving product liability disputes outside of the traditional tort system. Both proposals need modification. But insofar as Senators Dodd and Gorton shift the focus of the debate away from tinkering with the traditional tort system and, instead, focus on alternatives to that system, they are to be commended.

At the same time, both proposals compel the defendant companies to participate in an alternative system. In this sense, I believe they both suffer from an Achilles heel. I suggest, instead, a system which builds on the Dodd and Gorton proposals but which is voluntary for both plaintiff and defendant. Legislatively prescribed incentives (and, more importantly, disincentives) should also be used to encourage litigant participation in such a new alternative system.

This issue of voluntary versus mandatory participation is a critical one. I am not advocating the concept of purely voluntary market-place participation in an alternative system to tort. Certain purely voluntary systems may, in fact, be successful; the so-called Wellington Group for the resolution of asbestos claims appears to be nearing success. I applaud Wellington and other similar efforts based upon purely private agreements.

But I do not believe that a purely voluntary system can be successful in resolving the various product liability crises. If such private agreements were the answer, they would have been implemented already to a far greater extent than has been the case. What I urge this Committee to consider is a legislatively created system which gives all of the parties important incentives for opting into a new system, while creating disincentives for maintaining allegiance to the old, traditional tort system.

The development of a statutorily authorized alternate process for resolving product liability claims—if voluntary—requires this Committee to focus its attention primarily on exactly what the incentives and disincentives should be which would result in the parties opting in favor of the new system. The development of such incentives and disincentives—of a series of carrots and sticks—will require profound changes in substantive tort principles. In this sense, of course, legislatively prescribed changes in procedure require important changes in substantive tort law as well.

AN ALTERNATIVE PROPOSAL

A. The proposal I suggest today, in rough outline, would not make the establishment of an alternative compensation system mandatory. Any manufacturer or product seller or insurer of a manufacturer or product seller could voluntarily choose to offer a program that would compensate any claimant, his estate, or guardian, for injury resulting from the claimant's use of or exposure to a product. The manufacturer or seller should have the option of making the offer applicable to all its products, or to just ones that it particularly designates. The firm should also have the option of jointly implementing a compensation program with other manufacturers or sellers.

B. Under the plan I am proposing today, a party injured by a plan-backed product would have some time from the date of discovery of the injury and its cause to elect between filing a claim for compensation or filing a tort action against the firm. Once the choice is made, it would be irrevocable. If the party decided to sue, he could not later file a claim. If the party decided to file a claim, he must give up his tort remedy for that claim against that firm. The election to file a claim would not, however, preclude that party from proceeding against other parties for his injuries in tort.

C. In order to recover under the claim determination process, the claimant would not have to show that the manufacturer or seller was negligent in causing the harm, or that its product was unreasonably dangerous or unsafe. Rather, participating firms would compensate the claimant for all actual losses resulting from use or exposure to that firm's product, unless: (a) the injury was caused by an open and obvious danger of the product; (b) the injury was caused by the claimant's alteration or modification of the product; (c) the injury was the result of the claimant's voluntary and unreasonable use of a product which the claimant knew was unreasonably dangerous; (d) the injury was caused by conduct of the claimant which was an extreme departure from accepted standards of care and attention; or (e) with regard to a generic product, the manufacturer or seller did not sell the product at the time and in the market when claimant's exposure to the product occurred. In other words, so long as the harm results from some reasonably foreseeable or anticipated use, and is not caused by a danger that is open and obvious, the participating firm would compensate the claimant for his economic losses only.

D. If a claimant were injured by a product manufactured or sold by more than one manufacturer or seller, and could not identify the specific manufacturer or seller of the product, he could file a claim against any participating firm that sold the product at the time and in the market when claimant's exposure to the product occurred. That firm, however, could recover its excess portion of compensation against any other participating manufacturer or seller of the product in proportion to that manufacturer's or seller's market share of the product in the relevant market at the relevant time. Where the paying firm desired to collect against a company which is a non-participating manufacturer or seller of the generic product, it would have to do so pursuant to common-law principles. Alternatively, the Committee might provide a mechanism for apportioning claims at the outset, according to market share, so that a firm's liability under the compensation system would not exceed any claim for economic injury that might be made by a plaintiff in court.

E. A claim would be accompanied by information, supplied by the claimant and others, adequate to enable the participating firm to make a reasonable determination on whether it must pay all, part, or none of the claim. If the claim were rejected, either in whole or in part, the claimant could sue the firm in order to resolve the matter. This suit would not be in tort; it would be a suit to determine whether or not the claim must be paid, and if so, in what amount.

Since the purpose of this trial is only to resolve the claim, recovery is similarly limited to economic loss, plus, perhaps, attorney's fees not to exceed a certain percentage of the recovery. The exception to this might be where the court finds bad faith on the part of the firm in not honoring the claim; in such a case, the firm might be liable to the claimant for punitive damages in an amount equal to the actual (economic) recovery. Conversely, if the court were to find that the claim is without justification, or if the court's award is less than, for example, 125 percent of the firm's offer, the claimant might be compelled to pay the firm's attorney's fees.

F. Under this proposal, for an injured party to recover in tort against a firm which has established a compensation program, he must prove that either the negligence, failure to conform to an express warranty, or intentional misconduct of the defendant firm caused the harm. That firm's strict products liability will be eliminated. If the plaintiff nevertheless does prevail in tort, there will be no limitation on the type of damages recoverable; the plaintiff would be eligible for economic as well as noneconomic damages. And if he could demonstrate by clear and convincing evidence that the harm suffered was the result of the firm's reckless disregard for the safety of product users or others who might be harmed by the product, then the firm would also be liable for punitive damages.

The most salient difference between the Gorton and Dodd proposals and the instant proposal is that, whereas their approach requires each product manufacturer and seller to establish a claims resolution program for each of its products, the instant proposal makes such action purely voluntary. Rather than invoking a governmental mandate, the suggested plan relies instead upon economic incentives to persuade firms to establish such programs. This not only minimizes the role of government and its regulatory superstructure, but also permits for experimentation in this novel approach to dispute resolution, and allows firms—the best judges of which products are well suited for this approach—to establish programs only for such products. The proposal attempts to strike a proper balance, through the use of incentives and disincentives, so that the claims system is established by firms and used by claimants when this will result in the most mutually beneficial resolution of a products liability dispute. For example, if the firm did not set up a plan, and was sued in tort, it would not get the advantage of avoiding strict liability, if strict liability would apply under current law.

The greatest incentive for firms to choose compensation programs is that such programs will be a giant step towards stability and certainty in products liability disputes. Instead of the constant spectre of endless litigation and potentially bankrupting awards, the firm can set up a fund that will quickly compensate legitimate claimants for their objectively determined actual damages. In addition, the firm will have the assurance that once a claimant chooses to file a claim, he cannot play both sides of the fence by later suing in tort if he is unsatisfied with its resolution. If the firm acts in good faith in deciding the claim, the most he will be liable for is economic damages. The firm is also assured that if it makes a fair determination of the claim it will not be hurt by the claimant rejecting this decision and going to court, because, as aforementioned, if the court finds the claim to be without substantial justification, or if the court's award approximates the firm's offer, the claimant must pay the firm's attorneys fees.

Consumers benefit as well under the instant proposal. In addition to the aforementioned advantages of avoiding the prospect of prolonged litigation, prohibitive attorney's fees, and at best uncertain recovery, the plan provides consumers with an easy and simple burden of proof within the claims system. The claimant must only show that he was injured by the product in the course of that product's reasonably anticipated use, and that the harm was not caused by an open and obvious danger. (This is in direct contrast with the Gorton and Dodd Amendments, which propose the tests for recovery be the unreasonable dangerousness and the unreasonable unsafeness of the product respectively. These complex and difficult standards of proof are among the primary problems with current law that such plans were designed to eliminate. By retaining them, these Amendments are simply transferring the inherent problems of strict liability away from the courts and into the claims system.)

Another incentive for the injured party to choose the claims system under this proposal is the assurance of fair treatment. If a claim is not honored, it will be subject to judicial review; and if this adjudication finds the firm to have acted in bad faith in rejecting the full claim, it will be liable for 100 percent punitive damages.

Consumers would only lose their strict liability in tort remedy if the firm had set up a claims system in which recovery would be sure and simple; and the chance of escaping full damages for strict liability would be a great incentive for manufacturers and sellers to set up compensation programs. The plan would be acceptable, workable, and mutually beneficial, while still maintaining the distinctive element of voluntariness.

Finally, the public as a whole benefits by having a voluntary, rather than a mandatory, claims system. If a product manufacturer or seller recognizes that a product is ill suited for this system in that it would make its price prohibitive, the firm should not be forced to establish a plan for that product. Such a consequence as the discontinuation of a product should be the result of market forces, and not governmentally mandated programs.

Mr. Chairman, I hope that my testimony proves useful to this Committee on furthering its review of the various product liability reform proposals. However we proceed, it seems to me that substantial changes in procedure and substances are desirable in combatting the product liability crisis. A voluntary system developed as an alternative to existing tort has the flexibility of being limited to very special fact patterns. There is no reason why we cannot substantially improve the way the law benefits those who suffer from man-made injuries. Obviously, nothing that I say today should be viewed as etched in stone. My goal in testifying is to offer specific ideas and recommendations for discussion and further thought, to avoid generalities and provide specific suggestions for resolving the unacceptable existing system of product liability law.

I offer my ongoing help and assistance to this Committee and will be glad to work with you, the members and staff in any way you deem advisable.

Senator KASTEN. Our next witness is Mr. Michael Goldberg, an attorney with Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg, Washington, DC.

Mr. Goldberg.

Mr. GOLDBERG. Thank you, Mr. Chairman. It is a pleasure to be here and I appreciate this opportunity.

My friend Feinberg always manages to get twice as much into his 5 minutes as I do.

I should at the outset state that I represent only our law firm. I represent no association of trial lawyers. We are trial lawyers. We do represent plaintiffs in personal injury and product liability litigation.

I am testifying because over a period of 9 years while on the congressional staff—and these hearing rooms now appear more awesome from the witness' perspective than from the staff perspective—I have had some considerable opportunity to study the workers' compensation system. And I think this committee, in doing its commendable job of evaluating the proposals of Senators Dodd and Gorton with respect to the alternative compensation schemes, might benefit from looking at how the workers' compensation system has dealt with some similar questions.

The questions are similar, but there is an important difference between the critical question in workers' compensation and the critical question in product liability. The critical question in workers' compensation is, Did the injury of the claimant arise out of and in the course of employment? Is it an employment-related injury?

The critical question in the Dodd and the Gorton proposals is: What caused the injury? Now, these are very different questions. Let me give you an example. It is the same example I gave in my written statement.

Smith is employed by X company as a delivery person. In the scope of his employment, one afternoon while making a delivery to X's customer, Smith while driving X company's Ford van becomes involved in an automobile accident and is seriously injured. Smith files a workers' compensation claim. No problem. X's compensation carrier is probably going to fall all over itself to pay that claim and settle that up real fast.

Same set of circumstances. Smith files a claim for compensation under the Dodd or under the Gorton proposal. What is going to happen? My sense is that Ford is not going to fall all over itself to pay that claim within 60 days or 75 days based on what we know about Smith's claim. In fact, Ford is not going to pay that claim until a court of last resort orders it to pay that claim.

The reason is, there is just not enough here to establish Ford's liability under a product liability sytem, under any mechanism, because questions which do not even have to be asked and, hence, do not have to even slow down the determination of the essential question in workers' compensation must be asked here: Those nasty little questions such as: Was Smith negligent when he drove the van? Was the accident Smith's fault? Was it the fault of someone else? Were the van's brakes defective? Was it a construction defect? Was it a design defect? Was the road wet? Why was the road wet?

None of those questions need to be asked in workers' comp. They all have to be asked in resolving a product liability claim, because otherwise you cannot answer the essential question present in both the Dodd and in the Gorton schemes, and that is, "Was the product unsafe? Was the product a proximate cause of the harm?"

So I think if the committee is going to borrow from workers' compensation mechanisms for resolving these claims, it must look at how workers' compensation mechanisms have dealt with those questions. Occupational disease is probably the only situation in workers' compensation where the causation issue is present. An occupation disease claimant must generally prove more than that the disease was work-related. An occupational disease claimant must generally prove what actually caused his illness. The reasons for this are set out in my statement.

And, when the workers' compensation system confronts occupational disease claims, it does a terrible job. Payment is very slow. Nearly 65 percent of the claims are contested by employers. Most of those contests nearly 75 percent, are on the basis of the causation issue. The time involved in litigating—and I use that word advisedly—litigating these claims is extremely long. The claims are very litigious. They are not readily resolved. And the causation question is the reason why they are not readily resolved.

Let me skip quickly to another problem where these schemes borrow from workers' compensation, and which I find very troublesome, and that is using wage loss as the measure of damage.

One has to ask why we are doing this or why the committee would be doing this. If we are considering these compensation schemes only to provide a ready means for quickly compensating people who suffer wage loss as a result of injuries due to dangerous products, Jim Mack's kind of situation, we already have a system in place which does that, or which purports to do that—workers comp.

On the other hand, if the compensation alternatives are intended to have a broader application we have an inherent discriminatory problem with using wage loss as the measure of damage. An infant can be a product liability victim. No wage loss. A retired person can be a product liability victim. No wage loss. Even an employed woman who is a Dalkon Shield victim, though she is rendered sterile, and suffers grave pain, may not suffer a day's worth of wage loss. Wage loss is not the measure of damage which is appropriate in a products case, and this is an unseemly borrowing from the workers' compensation system.

Let me conclude briefly because my yellow light is on. I think that it is commendable that Senator Dodd and Senator Gorton have proposed alternatives, and I think it is commendable that this committee is seriously studying them. I think it should continue to seriously study them. There may very well be a way of easing some of the burdens of litigation on the parties. There may very well be an automatic system which can be applied in some kinds of situations, and the committee should continue to search for it.

I think, however, reliance on workers' compensation as the prototype is probably misplaced.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF MICHAEL J. GOLDBERG, ATTORNEY

I appreciate this opportunity to testify at these hearings, at which the Subcommittee begins its examination of the proposals of Senator Dodd and of Senator Gorton to establish compensation schemes as alternatives to traditional tort litigation for the benefit of certain persons injured as a result of dangerous or defective products, who may, for one reason or another, believe that the traditional tort remedies or the traditional litigation process is an unsuitable recourse. There may be a need for such a compensation scheme. There certainly is a need for the Subcommittee to explore the suitability and viability of these proposals.

I think the Subcommittee is to be commended for embarking on this course. It will be an arduous one, for the problems are both complex and manifold. I regret, however, that I can find little that is commendable in either the Dodd or the Gorton compensation-program proposals in their current form. I think that some considerable work will have to be done before either of these proposals will be a suitable alternative to tort litigation in protecting the rights of products users and consumers, or in compensating those who are injured or killed as a result of dangerous or defective products.

Both the Dodd and the Gorton proposals appear to be patterned on workers' compensation programs. Accordingly, I believe that if this Subcommittee studies how workers' compensation has functioned in this country, the weaknesses and the defects of both the Dodd and Gorton proposals will become clear.

It is in that light that I hope I might be helpful to the Subcommittee. While on the staff of the Senate Labor and Human Resources Committee (1976-1981), and on the staff of the House Education and Labor Committee (1981-1984), I have had the opportunity to study extensively the operation of the workers' compensation system in the United States. That study makes me less than sanguine about the workability and the fairness of the Dodd and Gorton compensation proposals.

First of all, the very premise of the Dodd and Gorton proposals—that a victim will simply file a claim and the product manufacturer will accept it and pay it—is an outrageously hopeful and optimistic one. The instinctive reaction of a manufacturer, and more significantly, of its insurance carrier, would be to deny liability unless the evidence of its responsibility is overwhelming.

The workers' compensation type of mechanism by which these claims would be processed, and by which the determination of liability would be made, is simply not capable of resolving the issues which would be presented in product liability claims. In practice, this mechanism has only rarely even been called upon to resolve these issues. While workers' compensation is a "no fault" liability system, and both the Dodd and Gorton proposals are styled as "no fault" liability systems, it is here that the similarity ends. Because, while both Dodd and Gorton are purportedly "no fault" systems, an essential element of liability in those systems is proximate cause—that is, a manufacturer's liability is based on a finding that the manufacturer's product caused the plaintiff's (or claimant's, if you will) injury. There is no proximate cause issue in workers' compensation. In workers' compensation, the employer's liability is premised on whether the claimant's injury was employment-related—that is, whether the injury "arises out of and in the course of employment." Once that question is answered, the question of what actually caused the injury is irrelevant. Under the Dodd and Gorton proposals, the question of what caused the injury is the question.

Let me give an example. Smith is employed by X Company as a delivery man. During his normal working hours, while on his way to make a delivery to X's customer, Smith, driving X Company's Ford Van, gets involved in an automobile accident and suffers serious injury. Smith files a workers' compensation claim. It's straightforward. Was Smith involved in the scope of his employment when he suffered his injuries? Of course he was. The claim will undoubtedly be paid. (There might be some quibble about the extent of Smith's injuries—how much he should be paid—but there would be little dispute about the work-relatedness of Smith's injuries.) This case should present little difficulty for a non-adjudicative determination of the essential question—work-relatedness. It presents little difficulty because questions such as "was Smith wearing a seat belt?", was it the other driver's fault?", was it Smith's fault?", "were the brakes or steering mechanism in the van defective?", "was that a construction defect or a design defect?", simply do not have to be addressed in resolving Smith's workers' compensation claim.

Now, suppose Smith presented a claim to Ford under either the Dodd or Gorton proposal. Same fact situation, but it is not longer a cut-and-dried case. To prevail in this claim, Smith must demonstrate much more. All of those questions I just mentioned will have to be dealt with. Smith must demonstrate what caused his injury—specifically, that the Ford Van was the proximate cause of his injuries. This is a much more difficult question. The hypothetical situation I have presented, a straightforward one for workers' compensation, would, it seems to me, ultimately have to be litigated in the Gorton or Dodd schemes.

Same facts, different problems. And this underscores why the Subcommittee cannot just blandly assume that these types of determinations, often readily made in workers' compensation, will be so readily made under the Dodd or Gorton "no fault" compensation schemes. This is because workers' compensation generally doesn't have to deal with the hard question—what caused the injury. Workers' compensation deals most often only with a relatively easier question—was the injury related to the employment. To the extent that workers' compensation works (and there are many who would argue that it isn't working), it can still offer little comfort to the Subcommittee in its evaluation of the Gorton and Dodd proposals.

Indeed, there is one area of workers' compensation which I believe demonstrates that Gorton and Dodd will not work—the one group of claims where the workers' compensation system is called upon to answer the question of what caused the injury rather than whether the injury is employment-related: occupational disease claims. And with respect to occupational disease claims, the workers' compensation system has failed, miserably. (Occupational disease cases require a showing of causation as a practical matter because disease onset rarely follows a traumatic occurrence which can be readily traced to the work place, and because of the long latency period often associated with diseases. In addition, many state laws preclude workers' compensation recovery if the disease is an "ordinary disease of life." Thus, to demonstrate work-relatedness, an occupational disease claimant often must show the cause of the disease.)

A 1980 study by the U.S. Department of Labor, analyzing data of closed workers' compensation claims, shows that of accident workers' compensation claims which were ultimately paid (where the causation question is generally not an issue) less than 10 percent were contested by the employer; while of the disease workers' compensation cases which were ultimately paid (where the causation question is often an issue) nearly 63 percent were contested. Of the accident cases that were contested, only about one in five were contested on the issue of causation (workrelatedness), while for the contested disease cases, nearly three out of every four were contested on the causation issue. (Source, "An Interim Report to Congress on Occupation Diseases", U.S. Dept. of Labor, June, 1980, pp. 69-70.) What this indicates is that when presented with the tough causation issue, the workers' compensation system simply breaks down. Claims are not perfunctorily handled. The issues are most often litigated.

What these data suggest is that the closer the question comes to pure causation, the more necessary it is to resort to an adjudicative mechanism for an orderly presentation of the evidence necessary for the making of the essential determinations of liability. Reconsider the example of Smith and the Ford van. Evidence necessary to establish work-relatedness is relatively straightforward and readily available to both parties—personnel files, time cards, an uncomplicated statement by the injured worker, co-employee or supervisor. The dossier is assembled. The employer or carrier can make a decision. It is done. But when the crucial question moves beyond work-relatedness to what actually caused the injury—the evidence becomes much more complicated. Now we are talking about expert's reports, analysis of metal fatigue, evidence about the victim's own conduct, statements from eye-witnesses; all of which will provide need for counter analysis of metal fatigue, counter reports from counter experts—a case which is clearly not heading for a non-adjudicative determination of liability.

What is clear is that most of the claims filed in the Gorton or Dodd mechanisms will ultimately be litigated. It is folly to be designing this system for the few cases where causation is straightforward. And unnecessary, too. Cases where causation is straightforward present no problem in the present tort system. They settle right out, with a minimal expenditure of attorneys' fees and of judicial resources.

And so, it must be anticipated that many, perhaps most, of the claims submitted to the Gorton or Dodd proposal will be contested and litigated. And this will result in some considerable delay—and in considerable cost to the parties.

Again, the Subcommittee should be guided by the experience in workers' compensation. Barth and Hunt in their seminal work on occupational disease compensation ("Workers Compensation and Work-Related Illnesses and Diseases", MIT Press, Cambridge, 1980) analyzed the results of the 1975 Workers' Compensation Closed Claim Survey. In comparing the total time necessary to resolve and close claims (and recognizing that the majority of disease claims—the ones presenting the causation question—are contested), the following emerges:

The mean number of days from the beginning of lost time to closing of the case: Accident cases—233 days; disease cases—404 days (table 5.21).

The mean number of days from notification of the insurer to issuance of first benefit payment:

Accident cases—43.2 days; disease cases—255.6 days (table 5.23).

(To put these figures in perspective, it must be noted that because of the sampling techniques used, the closed claim survey consists almost entirely of cases which were paid—only about two percent of the claims in the survey were not paid. Inclusion of cases which were ultimately denied would undoubtedly result in even longer time spans.)

These data demonstrate that where the causation question is complicated, there will be considerable time-consuming litigation to resolve claims in the Dodd or Gorton systems. More distressing—even in straightforward, uncomplicated, non-contested cases—the time frames within which the claim must be paid contemplated by these proposals (60 days in the Gorton proposal, 75 days in the Dodd), are unrealistically hopeful. Even in straightforward, uncomplicated cases, it will be difficult to gather in all the medical expense reports within such a short period. Where injuries are serious, it will take longer for the victim to reach maximum medical improvement, and until the victim has reached maximum medical improvement, his or her potential wage loss—the measure of damage under both the Dodd and Gorton schemes—cannot be determined.

This latter leads to the next area in which I believe the Dodd and Gorton proposals mistakenly borrow from workers' compensation concepts—the use of wage loss as the measure of damage. These provisions of both the Gorton and Dodd proposals reflect an incomplete understanding of workers' compensation. The measure of damages in workers' compensation is not "wage loss" but is actually the loss of wage-earning capacity. The difference between pre-disability earnings and post-disability earnings (the wage loss) is simply a shorthand device for projecting the lost wage-earning capacity.

Even this device has broken down in workers' compensation in the increasing number of occupational disease and cumulative trauma cases where the disability, even though clearly work-related, first manifested itself after the worker retired. In such circumstances, there is a "loss of wage-earning capacity," but there is no "wage loss" to serve as a handy measure. And, the inability to fix on a shorthand measurement of compensation benefits has made these extremely troublesome cases, difficult, time-consuming, and expensive to resolve.

But, at least, with respect to workers' compensation cases, "lost wage earning capacity" is a somewhat rational concept for measuring damages since, by definition, all workers' compensation claimants are wage earners. That is not the situation in products cases, however. Some victims will be unemployed, some will be retired, some will be minors. For these victims, keying compensation to lost wages makes no sense at all. A couple of examples will suffice.

A husband and wife are in an automobile with defective brakes which are the cause of a single-car accident which leaves them both as quadraplegics. The husband, age 30, is employed outside the home and earns $100,000 a year. The wife, age 30, is not employed outside the home, and earns no wage. Under these proposals, both would receive medical expenses and maintenance costs. The husband would also receive about $3.5 million in lost-wage compensation. The wife, with the same injuries, from the same accident, resulting from the same defective product, would receive no additional compensation.

The same inconsistent result would apply if, instead of the wife, the other person in the car was their eight-year old child, or a retired parent.

Indeed, even where the product victim is employed, measuring damages in terms of wage loss may make no sense. A Dalkon Shield victim may suffer severe pain, she may ultimately become sterile and as a result suffer considerable emotional distress—and yet, she may never miss a day of work. Under either the Dodd or Gorton proposals, she would receive no wage-loss benefits, only her medical expenses; and under both proposals, if her own health insurance paid her medical expenses, the product manufacturer would pay nothing at all.

As can be seen, using wage loss as the measure of damages in products cases leads to unfair and inconsistent results, and may, in fact, make the entire scheme Constitutionally suspect. The Constitutional justification for workers' compensation is that both the employer and employee gave up valuable legal rights and defenses for something of value, and for a rational system.

"* * * it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages * * *. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary." *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 201 (1917).

"It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of Constitutional dimension." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S., 1, 19 (1976).

It would seem clear than that if a compensation program such as that proposed by either Senator Dodd or Senator Gorton is to be adopted, it will be necessary for the Subcommittee to fix upon some fair and adequate, and rational, measure of damages in products cases. I believe that wage loss will simply not suffice in this regard.

Both the Dodd and Gorton proposals suffer as well from what they fail to "borrow" from workers' compensation: the lack of a supervising agency. The Federal workers' compensation programs, and most states as well, provide workers' compensation agencies to supervise and regulate the operation of the system. These agencies establish the ground rules and oversee the payment of claims. There is no such mechanism in either the Dodd or Gorton proposal. As a result, any disagreement as to payment, any quibble about late or lost checks, any administrative problem which occurs—even after a claim has been accepted by the manufacturer—can only be resolved through the expensive and time-consuming arbitration or judicial processes provided in those proposals. I believe that it is a serious mistake to clog up your adjudicative mechanism with this kind of problem. It is far better to have some sort of supervising agency to deal with these kinds of problems.

In this regard, I find the Dodd proposal particularly troubling. Sections 205 and 206, when read together, would seem to suggest that a manufacturer is liable for economic harm incurred to date, and that a victim may submit a claim for further economic harm as it is incurred. If this means that in a case of continuing disability with continuing wage loss, the victim must return to the system every week or every month that he is still unable to work for further compensation, then this system is in for a lot of trouble. If that is the case, then the Dodd system looks a lot like the "wage loss" workers' compensation system which has been operating in Florida for the past several years. The Subcommittee should look at what has happended in Florida. It will be sobering. First of all, the number of adjudications necessary multiplies exponentially. Every time a claim for continuing wage loss compensation is filed, a new and separate determination is necessary; is the claimant still unemployed? is he or she capable of working? what would he or she earn if he or she did work? Each continuing wage loss case becomes ten, or twenty, or more.

In addition, the Subcommittee cannot be unmindful of the manifold opportunities this presents for continuing harassment of the claimant. Since the only means of resolving these disputes is the expensive arbitration process provided, half the cost of which must be borne by the victim, it won't be long before the victim simply knuckles under and accepts a settlement. The lack of an agency to supervise this process makes this a real and frightening possibility.

If either of the compensation programs is to be an altenative to tort litigation, as they are purported to be, then the victim must have an informed choice. To make an informed choice, the victim must be able to rely on counsel—yet neither proposal makes adequate provision for counsel at the critical stage of the proceeding, when the victim must elect his choice of remedy—an irrevocable election.

Indeed, the Dodd proposal makes no provision for compensation of the victim's attorney until the claimant has elected the compensation system, his claim has been denied, and the claimant decides to sue the manufacturer pursuant to section 204(b). The victim must even rely on the manufacturer to inform him of his right to sue in these circumstances.

Finally, while not directly related to workers' compensation experience, I would be remiss if I did not mention my concern about the extremely low level of payment contemplated by these proposals, especially the Dodd proposal. Section 205 provides, essentially, that the manufacturer shall pay only for economic harm which is not paid or payable from any other source for the same injury. This includes government programs. The effect of this is to make the manufacturer of the dangerous or defective product which was proximate cause of the harm, absolutely the payer of last resort. Let's take a look at who would pay first:

The victim's own health insurance plan (such as Blue Cross) would pay medical and rehabilitative expenses first, even if the victim paid for the health insurance himself;

Workers' compensation, paid for by the employer, would pay medical expenses and wage loss first, if the injury occurred as a result of employment. Even if the victim didn't apply for workers' compensation, the amount he would have received if he had applied is deducted from what a manufacturer must pay;

If the victim dies as a result of the defective product, his or her own life insurance pays first, and the manufacturer need only pay if the wage loss exceeds the life insurance proceeds;

If the victim had bought his or her own income-protection insurance, that insurance pays first, and the manufacturer need only pay for wage loss, if any, which exceeds that insurance;

If the victim is eligible for state disability payments, or for Social Security Disability or Medicare, the taxpayers pay first, and the manufacturer of the defective product only picks up payment where the taxpayer leaves off; and

If, as will often be the case in automobile cases, the injury was the result of both a defective product and the other driver's negligence, if the victim sues the other driver and recovers, that negligence recovery will all but wipe out the liability of the manufacturer.

This transfer of the cost of dangerous and defective products to employers to the taxpayers or even to the victims themselves, is simply unsound social policy. It reduces the potential liability of a product manufacturer to a small, manageable and easily projectible amount. One fears that this, in turn, will lead to cynical cost analysis determination in product design and marketing, which will result in continual marketing of known dangerous products, because the small potential liability makes doing so "cost-effective." In this regard, too, the regularization of and predictability of costs in workers' compensation, together with the insurance and risk-spreading mechanism, have led most observers to conclude that the worker' compensation liability has little bearing on improving work-place safety conditions. The Subcommittee should understand this before it discards the effect which product liability (essentially, the effect of the market place) can have on encouraging product safety.

Both these proposals break new ground in the area of product liability. No responsible legislator would contemplate enacting them into law without a complete understanding of their workability. It is to promote this kind of inquiry that they were proposed, and I commend Senators Dodd and Gorton for proposing them, and the Subcommittee for undertaking this study of their compensation proposals.

Workers' compensation provides, I believe, the closest parallel to the kind of mechanisms Senators Dodd and Gorton have proposed. And the workers' compensation experience can be a great aid to the Subcommittee in evaluating these proposals, in identifying their flaws, and hopefully, in dealing with those flaws.

Senator KASTEN. Thank you for your testimony and I appreciate the fact that although we disagree in part, that you agree that we ought to continue to work in terms of trying to resolve this very complicated set of issues.

I just want to ask Mr. Feinberg to respond to the point about the alternative claims systems not being capable of resolving the causation questions presented by product liability claims, suggesting that most claims are going to ultimately be litigated anyway.

What is your response to that basic argument?

Mr. FEINBERG. Two responses. I think Senator Dodd made that point as well, suggesting that his proposal might not work in areas involving difficult causation issues.

The first response is, as you know, Senator, that even in cases where the chemical industry or the oil industry or any number of industries are convinced that causation is absent, there are costly inefficient down sides to continuing the existing tort litigation. Transactional costs alone in the agent orange case approximated, I am told, over $100 million—before the trial even commenced.

I suggest that in a number of cases, rather than go into the crap shoot that is the existing tort system, the defendant might opt into an alternative system where, if it was purely voluntary, it could delineate the nature of the product and the nature of the claim for which it would be willing to pay some award just to get out from under traditional tort exposure. That is my first answer.

Second, I think that in most other cases, causation is not the key issue. Mr. Mack and some other witnesses have testified that there are a number of product liability crises, and one should not reject the Dodd-Gorton approach, or some of the ideas that I have suggested today, on the theory that causation is the big hangup. It may be for the mass disaster cases—such as agent orange. But asbestos is not really a causation problem, and there are any number of other traumatic injuries where causation is not the issue. The only real issue is fault. And if you do away with proof of that requirement, in return for a cap on recovery and prompt payment, I suggest to you that, if you make the new system voluntary on both sides, you may just find people knocking on the door to opt in to that system.

Senator KASTEN. Senator Danforth.

The CHAIRMAN. No thank you, Mr. Chairman. Very good testimony.

Senator KASTEN. Obviously these are complicated issues. We look forward to working with both of you as resource people as we struggle through the next section of trying to work on this compromise.

I would like to thank you both very much.

Our next panel is Mr. Sevier, Mr. Marvin, and Mr. Mullen.

We are looking for Mr. Marvin. I see the sign. Oh, there we go.

The committee will come to order. The first statement in this panel will be given by Mr. Ernest Sevier who is the past chairman of the section of tort and insurance practice of the American Bar Association.

Mr. Sevier.

STATEMENTS OF ERNEST Y. SEVIER, PAST CHAIRMAN, SECTION OF TORT AND INSURANCE PRACTICE, AMERICAN BAR ASSOCIATION; RAYMOND MARVIN, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL; AND MICHAEL J. MULLEN, COUNSEL ON BEHALF OF THE PRODUCT LIABILITY ALLIANCE

Mr. **Sevier**. Mr. Chairman and members of the subcommittee, thank you on behalf of the American Bar Association for allowing me to present this testimony. I appear today at the request of American Bar Association president John C. Shepherd to transmit our views on victim compenstion for product liability injuries.

In February 1983, the ABA's House of Delegates, our elected legislative body, provided the following resolution:

> Be it resolved, That the American Bar Association opposes enactment of broad Federal legislation that would codify the tort laws of the 50 States as they relate to product liability and opposes legislation such as S. 2631 (the predecessor of S. 100) reported by the Senate Commerce, Science and Transportation Committee in the 97th Congress, that would attempt to do so.
>
> Further resolved, That the American Bar Association supports Federal legislation which addresses the issues of viability and damages with respect to claims or damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: (a) there is a long latency period between exposure to the product and manifestations of the disease; (b) the number of such claims and liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and (c) the number of such claims have become clearly excessive burdens upon the State and Federal judicial systems.
>
> Further resolved, That the American Bar Association supports enactment of Federal legislation allocating product liability risk between the Federal Government and its contractors in providing in certain instances indemnity against those risks.

Thus, the ABA strongly opposes broad Federal legislation preempting State law in the area of products liability. However, we support narrowly drawn Federal legislation on victim compensation which addresses the issues of liability and damages with respect to claims arising out of occupational diseases—such as asbestosis—with long latency periods, in cases where the number of such claims and the liability for such damages threatens the solvency of a significant number of manufacturers engaged in interstate commerce, and the number of such claims have been excessive burdens on the judicial system.

We support this limited Federal intervention because we believe the current social phenomena presented by certain latent occupational disease—such as asbestosis—has presented a catastrophic problem on a national scale for asbestos workers and for the asbestos industry. The problem involved in providing adequate compensation to persons injured by certain latent occupational diseases and in resolving questions of liability for such diseases is a unique problem of such magnitude that it warrants attention at the Federal level.

We urge you therefore to turn your attention away from the broad Federal preemptive product liability proposals and, instead, focus on legislation which seeks to remedy the complex problems resulting from asbestosis and diseases, the magnitude of which is not known for an extended period of time. At the time the ABA adopted its resolution on victim compensation, as well as now, no need was demonstrated to cause the ABA to call for a broader compensation proposal than is called for in the resolution. Because the alternative compensation provisions of Senators Dodd and Gorton were just recently offered, we at the ABA intend to study them further. We, however, see no need to enact the proposals of Senators Gorton and Dodd that provide for a broader Federal preemption of State product liability laws.

There is a great need for Federal attention to the urgent national problem resulting from asbestosis and certain other latent occupational diseases. To enact legislation to help solve this problem would be commendable. As we have testified in great detail before, however, to enact broad Federal products liability legislation would be an unwise intrusion of massive proportions on the longstanding authority of States to promulgate court laws according to their individual social and economic need.

Our judicial system has reached its unparalleled position of justice among the legal systems of the world by adherence to the evolutionary rules of common law developed by the State courts and supplemented by State legislation. We respectfully urge the wisdom of the rules not be undermined, but instead be maintained by opposition to broad Federal preemptive legislation in the products liability field.

The ABA is not opposed to tort reform. On the contrary, it has commissioned a just-completed, in-depth study of the present system and proposed changes. The voluminous report has been the subject of a recently completed symposium in Lexington, KY, attended by a broad section of the bar, representing all facets of the affected fields of industry, consumers, et cetera.

The bottom line result of this symposium of all this broad section of people including tort reformers and advocates of the position stated by this committee, the bottom line was that the tort reforms definitely should be studied and should be promulgated, but within the present framework of State laws and State legislative law. Thank you.

Senator KASTEN. Our next witness is Mr. Raymond Marvin, the executive director and general counsel of the National Association of Attorneys General.

Mr. Marvin.

Mr. MARVIN. Mr. Chairman and members of the subcommittee, I appreciate this opportunity to appear before you today to provide testimony on behalf of the National Association of Attorneys General concerning these amendments to S. 100.

My name is Ray Marvin. I am the executive director and general counsel of the National Association of Attorneys General. I am particularly pleased to be here today because one of the sponsors of one of the amendments under review is Senator Slade Gorton, a distinguished former Attorney General of the State of Washington, and, in fact, the former president of our association. And, of course, the chairman of the committee, Senator Danforth, is also a distinguished former member of this association.

I want to preface my remarks by promising you that I will not mention the words "Illinois Brick." This is just product liability.

There are problems, there are no doubt problems. The Attorneys General of the States are perfectly aware of the fact that there is controversy concerning insurance costs, concerning the timeliness of the awards. There are problems of transaction costs. And it is entirely appropriate that this body concentrate on such matters.

The association in June 1984 passed a resolution opposing S. 100's immediate predecessor, S. 44. The Attorneys General were deeply concerned over that bill's unprecedented preemption of State tort law. That bill raised in our minds very important and fundamental questions of Federalism. The principles of Federalism, we strongly believe, require that States maintain their traditional reponsibility to enforce tort laws to protect their citizens against injuries and compensate victims injured by defective products.

S. 100 treads heavily on these legitimate and traditional State prerogatives and we are, not surprisingly, opposed to that aspect of it. The association strongly believes that proponents of Federal preemption bear the responsibility of demonstrating a pressing national interest for usurping traditional State authority. We believe that the need for such a sweeping preemption has not been demonstrated.

The association also opposed S. 100's predecessor because of its drastic curtailment of the ability of consumers to win compensation for product-related injuries; thereby diluting the deterrent value of current law and lessening manufacturers' incentives to safely design their products.

The association, unfortunately, has not had an opportunity to study or take a position on either of the two proposed amendments to S. 100 under consideration today. Both amendments will be brought up for discussion at our policy meeting in mid-July, just 30 days from now. After that meeting, I would be happy to inform you in writing of any position that the association takes with respect to these amendments and to answer any questions you might have. If a position is taken and if further hearings are held on these amendments, I would welcome the opportunity for an Attorney General of one of the States to testify on behalf of the association.

Although the association has no official position on either of these amendments, I believe the following general observations could be made on these creative attempts to balance competing interests.

We are following with interest the subcommittee's shift toward the issue of compensation. This may be a very constructive step in your deliberations on the issue of product liability. We believe that these proposals which merit further serious and careful consideration, especially in light of the significant differences between them may provide the basis for resolving this very difficult issue of balancing the rights and obligations of producers, sellers, and users of defective products.

Our initial review of both Senator Gorton's and Senator Dodd's amendments leads us to state that these proposals appear to be preferable in certain respects to S. 100. First, we find that these alternatives are less intrusive into an area of such traditional State concern as product liability. Our preliminary review of these amendments also reveals that these amendments appear to do a better job of balancing the interests of manufacturers, sellers, and product users and of persons injured by unreasonably dangerous products.

We are also encouraged by Senator Gorton's and Senator Dodd's commitment to encouraging expeditious payment of damages to injured persons. We plan to undertake a very careful review of these amendments and will inform you of the action that the Attorneys General take.

In conclusion, I do appreciate the opportunity to testify before you today, and I and the association look forward to working closely with you and with majority and minority staff members in the days ahead on this very important issue.

Thank you very much, Mr. Chairman.

Senator **Kasten**. Mr. Marvin, thank you for your testimony.

The last witness on this panel is Mr. Michael Mullen on behalf of the Product Liability Alliance.

Mr. Mullen.

Mr. **Mullen**. Thank you, Mr. Chairman. I appreciate the invitation to appear today on behalf of the Product Liability Alliance which is a group of more than 150 businesses and trade associations who are interested in the product liability problem.

In the past I have served as counsel to this subcommittee and as counsel to the Judiciary Committee, and during that time I worked on product liability legislation, no-fault automobile insurance bills, and other product safety and insurance issues.

In light of that experience, Mr. Chairman, let me observe that you have been more than patient in holding hearings about product liability. These hearings date back to 1981 when you began, step by step, and sometimes inch by inch, to draft a fair and balanced product liability bill.

In light of these facts, I am somewhat surprised to hear witnesses today raise questions about the need for product liability legislation and to travel down roads that you have already traveled down and found to be absolutely vacant.

For example, it is once again suggested by the American Bar Association that there is no need for uniform product liability laws. Nevertheless, as was true with Mr. Sevier's testimony in 1982, he has not shown how the product liability issues will be addressed by State legislatures.

The current system of 51 sets of different rules has led to a total product liability jumble. Now, it is like a situation where you have got a hockey team playing against a basketball team in a football stadium and with officials from the Italian Soccer League as referees. We have a jumble—a hodge-podge of rules, and there is no way the State legislatures or the State courts are ever going to come up with a uniform system of rules for products liability.

And that is what we—the TPLA—have been seeking. That is what we have been working on with you for the last 4 years.

And this is a serious problem. Many people dismiss it and say, well, product liability is not really a problem. There is a recently published study of the Insurance Services Office, entitled "The Coming Capacity Shortage." This report indicates that there is going to be a shortage of $7 billion in insurance coverage that is needed by businesses in the United States next year. That amount will increase to $20 billion in 1986, and to $28 billion in 1987. In other words, 26 percent of what you would normally expect businesses to be seeking in insurance coverage for product liability risks and other types of liability and property coverage is not going to be available.

And, the concluding section of the Insurance Services Office report, states that the civil justice system has to be fundamentally changed to do away with inefficiencies and excessive costs, or the basic financial structure of the insurance business, if not major corporations, will be threatened.

A fundamental step in that direction is to establish uniform rules of product liability. We have demonstrated in previous testimony before this Committee that the product liability is inextricably intertwined with interstate commerce. Most products are produced in one State and shipped to other States. So we find it somewhat surprising that you are still receiving testimony claiming that this is not a national problem which does not need a national solution.

The American Bar Association published a report on the tort system, to which Mr. Sevier referred, and that report represents what I believe has been called by another observer "arrogant complacency" about the existing tort system. The insurance press is filled with reports about companies being cut off from insurance coverage. Doctors in Maryland will probably be without medical malpractice insurance in 3 to 6 months.

It is not just product liability that is a problem. It is the entire tort system. But the only way, and the specific area that the Congress can address is product liability, because that is directly to related to interstate commerce.

I want to mention just one other thing about the American Bar Association report on the tort system because that report suggests that Secretary of Commerce Malcolm Baldrige is against Federal product liability law and believes the issue should be left to the States.

Now, as the ABA Special Committee and its reporter, Prof. Marshall Shapo, well know, Secretary Baldrige endorsed product liability legislation in a letter to this committee on September 9, 1982, and on several occasions since then. This is only one example of the numerous instances in which the ABA report has twisted facts to support its preconceived notion that no legislation to clarify product liability tort rules is needed.

Now let me just address the issue of compensation which is the subject of today's hearing. In the prior hearings of this committee, David Greenberg, then the Government relations director for the Consumer Federation of America, suggested that Congress should address compensation because certain individuals might fall through the cracks of the tort system and that there should be some way to compensate these so-called innocent victims.

This class of innocent victims can really be described in the following fashion. You have an injured person who used the product in the ordinary expected way; they had not been informed of the particular risk involved with the product; the risk was not known at the time the product was manufactured; the person suffered a serious injury; and the person did not have insurance or other sources of compensation.

Now, that is a class of persons that, from a social standpoint, some would argue are deserving of recovery. The problem that we

TPLA sees is that the scope of the Dodd and the Gorton legislation, as currently crafted, encompass a much broader range of claimants than this narrow class of innocent victims.

In sum, Mr. Chairman, let me say that although the Product Liability Alliance has serious reservations about the current compensation proposals we will work with the committee. We believe that the issue of compensation is an important one. We also believe we share the views of Senator Dodd that it is very important that any tort system that is linked to a compensation system must provide that the tort liability is limited to only those claims where there is clear evidence of negligence, so that the focus of the tort system is on those claims where there is a need for punishment and deterrence, and you put the other class of claims into the compensation system.

Mr. Chairman, I see that my time is up. I will be happy to answer any questions of you or Senator Danforth.

[The statement follows:]

STATEMENT OF MICHAEL J. MULLEN

Mr. Chairman, thank you for your kind invitation to appear here today on behalf of The Product Liability Alliance to discuss product liability and compensation systems.

In the past, I have served as Counsel to Consumer Subcommittee of this Committee and, during my twelve years of service on the Hill, addressed product liability legislation, no-fault automobile insurance bills, and other product safety and insurance issues.

In light of that experience, let me observe, Mr. Chairman, that you have been more than patient in holding hearings about product liability. The hearings stem back to 1981 when this Committee step by step, and sometimes inch by inch, began to draft a balanced and fair Federal product liability bill. In light of those facts, I first want to express some surprise that a number of witnesses here today have gone down roads that you have already travelled and found, after careful study, to be absolutely vacant.

For example, it is once again suggested by the American Bar Association that there is no need for uniform federal product liability law. Nevertheless, as was true with Mr. Sevier's testimony a number of years ago, he has not shown how the product liability problem can be addressed without federal legislation. The current system of 51 sets of different rules has led to a total product liability jumble and, in part, been a cause for a capacity shortage in the insurance industry, which is unprecedented.

A very recently published study of the Insurance Services Office, entitled, "The Coming Capacity Shortage" states that available property/casualty insurance may fall short of demand by $62 billion over the next three years. Of equal importance here is to note that 91 percent of that shortfall would be in commercial lines. The study observes that "The commercial lines shortfall would be $7.1 billion or 9 percent of the commercial lines market this year, $20.6 billion or 22 percent in 1986, and $28.3 billion or 26 percent in 1987." This differentiates the current crisis from prior events in 1969 and 1975 when the adversity hit personnel insurance lines.

A section of the study devoted to evaluation and recommendations states:

"The civil/justice system has to be fundamentally changed to do away with the inefficiencies and excessive costs, or the basic financial structure of the insurance business—if not major corporate entities—is threatened."

A fundamental step in this direction is to have uniform product liability law in all states. It is unfortunate that we have to repeat, once again, that product liability law is inextricably intertwined with interstate commerce. The overwhelming majority of products are shipped out of the state in which they are manufactured. When and if injuries occur, they generally happen in a state other than the state of manufacture. Since all the states have everchanging laws, there is no way manufacturers or insurers can assure themselves of compliance with design safety and warning standards. The net result seriously compromises safety and creates burgeoning and unnecessary legal costs. The solution to the product liability problem should be through federal legislation.

Unfortunately, the organized bar continues to ignore or obscure the problem. For example, a recent report by a committee appointed by the American Bar Association suggests that there should be no Federal product liability law because Congress has not done anything about the medical malpractice crisis. Well, medical malpractice, while a serious problem, does not even begin to have the interstate commerce aspects of product liability. Doctor/patient transactions occur in the same state. President Reagan's letter of September 1984 make it clear that he and the Administration believe that product liability has become part of interstate commerce and that this problem should be addressed immediately by the enactment of uniform Federal product liability tort law. S. 100, which has a carefully set balance between consumer and busines interests that has evolved so painstakingly over many years, is the best vehicle to accomplish that purpose.

The ABA Committee Report also suggests that the Secretary of Commerce, Malcolm Baldrige is against a Federal product liability law, and believes this issue should be left to the States. As the ABA Special Committee, and its Reporter Professor Marshall Shapo, well know, Secretary Baldrige endorsed Federal product legislation in a letter to this Committee on September 9, 1982 and on several occasions since then. This is only one example of numerous instances in which the ABA Report has twisted the facts to support its preconceived notion that no legislation to clarify product liability tort rules is needed.

These hearings were not called to readdress old issues, but I did so because a number of witnesses, who simply do not want anything to happen, have again dredged up old arguments. Let me now turn to the new. The new is alternative compensation systems—alternative to the tort litigation system.

I think it is worth going back to see where this approach was first raised in hearings about product liability. It appears to have begun when the then Legislative Director of Government Relations for the Consumer Federation of America, David I. Greenberg, suggested that the fault-based product liability tort system was flawed because it did not provide compensation for certain injured parties whom he called "innocent victims". This class of innocent claimants had the following characteristics:

The injured party had used a product in its ordinary intended way;

He or she had not been informed of a particular risk;

That risk, which was not known at the time of the manufacture of the product, was a very serious one, which caused a devastating injury; and

The individual, unlike most people, was without medical or other insurance, and was simply cast adrift without any compensation

The Consumer Federation of America representative suggested that the Committee should focus on this class of persons and provide a remedy so that they, at least, could receive their actual out-of-pocket losses. No testimony, however, actually indentified the scope of this problem.

The Product Liability Alliance has indicated that the issue of whether and how such a person should be compensated is a problem that deserves careful study. We believe that the problem should be studied after a uniform product liability tort law is enacted into law. We believe that after that law had some time to operate, all of us could better assess precisely the scope of this problem and how to handle this type of person. Was his harm a responsibility of society in general? Or the manufacturer who injured him? Or is it a joint responsibility of both?

In light of the Committee's focus on the issue of compensation now, however, we are, as you are, looking at the problem of injured parties who do not fit within the tort system. We are in the beginning of our efforts. We do not have a consensus, but we are following, carefully, these hearings and suggestions put forth by Senators Dodd and Gorton, as well as others.

Let me address a threshold issue regarding compensation legislation. First, there is the major public policy issue of whether product manufacturers should ever be responsible for the cost of an accident when they are not negligent. Assuming that it is deemed appropriate in certain defined instances to do so, through a limited-damage, compensation alternative, one has to resolve the problem of formulating that alternative. As the Federal Product Liability Interagency Task Force Study demonstrated, the problem is not an easy one to resolve.

Let me share with you, very briefly, why. Unlike the situation with formulating a tort law, there are no working examples of state general product liability compensation schemes or models to look to and evaluate. You must draft a law in the abstract without the benefit of direct practical experience. Second, in designing such a law, you may find that your basic goals conflict with each other. For example, one goal is to compensate persons where it is fair and just to do so. A second goal is to reduce legal and other transaction costs that now burden the tort system. Where compensation systems have been used in the past, it has been easier, in contrast with compensating product related injuries, to balance these goals.

For example, under worker's compensation laws, compensation is paid to "all persons whose injuries arise out of or in the course of employment." While many cases have arisen over the years as to whether a person was or was not "in the course of employment", we still have a relatively clear insurable event. The same is true with automobile no-fault programs. There, the "insurable event" is an injury arising out of "the operation or use of an automobile."

With respect to products, however, it would appear to be unsatisfactory to utilize as an insurable event, "harm arising out of the use of a product". If that test of coverage were used, every time a person cut himself with a kitchen knife, got sick from drinking too much alcohol, or deliberately put his hand on a hot stove, he would recover damages. If you are to fashion a system, you must explore whether categories of injury scenarios can be defined where it is fair and just to provide compensation. As you use the English language to define these categories, you bring back, of necessity, disputes over eligibility for compensation. For example, if you were to decide that it is inappropriate to compensate a person who is hurt by an "obvious danger", some type of decision-making mechanism must be established to resolve what were and were not obvious dangers. Who is to decide that issue? Will lawyers be necessary? Some law professors have advocated systems that do not rely on an "compensable event" to set them in motion, but these alternatives also present problems that must be carefully studied.

There are many other issues involved in compensation systems, which I will not detail today, but the members of the TPLA and I would be pleased to discuss them with you, other Senators on the Committee and their respective staff. We at TPLA are looking at the topic, reviewing it, and attempting to develop a consensus.

In closing, I can share with you the belief of the entire TPLA membership that if the Committee were to pursue a compensation system path at this time, the rules of tort liability contained in current proposals must be strengthened to address all of the topics essential to achieve effective product liability tort reform so that tort actions will be focused solely on cases in which there is clear proof of wrongdoing or negligence on the part of the manufacturer or product seller.

We commend your efforts as well as those of other Senators who wish to resolve the product liability problem, and look forward to continuing to work with you. I close by again expressing great dismay at the words of some fellow lawyers, who are ignoring reality—the product liability problem is real, and the lack of insurance is making the situation worse than ever. It must be resolved now.

Senator **Kasten**. Thank you for your testimony.

Mr. Sevier, I want to make sure I understand. You suggested in your testimony that these are problems that ought to be addressed at the State level. Is that what you said?

Mr. **Sevier**. Yes, sir.

Senator **Kasten**. Can you give me an example of where you or representatives of the American Bar Association or the Trial Attorneys are in fact working for product liability reform on a State level, particularly for tort uniformity? I mean give me a couple of States.

Mr. **Sevier**. For tort uniformity? Well, first of all, when you said that we were working for it on the State level, the ABA is not taking any position regarding any legislation that has been passed by California or New Jersey or any specific State. The only position that the ABA has taken so far—and they don't oppose any uniform legislation—I mean uniform State laws—they don't oppose any specific laws because they have not been brought before the legislative body, but what has been brought before the legislative body, Senator, is the idea of broad preemptive Federal legislation, which they have opposed and consistently opposed.

Now, they have made the exception, as you know, and we discussed it last time we met, about asbestosis and latent disease.

Senator **Kasten**. You sat here for part of this hearing this morning and you listened to statistic after statistic. I don't know if you were here when you listened to the football helmet manufacturer—$13 million of claims in a $20 million industry.

You sat here and listened to some testimony about one manufacturer now manufacturing measles vaccine. You sat and listened to testimony in terms of 63, I think it was 63 percent involving one group of cases on asbestos all going to the legal system.

How long do you think that you, as the American Bar Association representative, can sit here and act as if you are deaf and do not recognize that there is a problem out there? I mean your testimony has not changed in 4 years. And clearly the nature of the problem has gotten worse and worse and worse.

You say once more that we are about to do another indepth review of tort law. How long can you remain blind to the problem that the rest of America sees so clearly?

Mr. SEVIER. No. 1, Senator, I disagree that the position has not changed in 4 years.

No. 2, that we have been deaf to any of this.

As you know, without rehashing the same ground again, the ABA has spent a considerable amount of time and effort studying this proposition. Certainly all the manufacturers' representatives were very much involved in presenting testimony and in testifying at the house of delegates and at the special committee that was formed to study this. And so they have not been deaf to these ideas.

Second, having listened to this, they have decided, as we have stated—and this has changed regarding the asbestosis problem which was one of the examples that you just used—they have felt that that problem has reached a catastrophic level and something should be done about it, and we certainly commend any efforts that are done in that regard.

But as far as the broad fields of covering all the product liability, we do not feel that the need has been established. We have listened, we have studied, and we still do not feel that that is—that in the balancing of situations, to throw out 200 years of common law as developed in this country at the State level—that the situation has reached such a drastic state to change that whole body of law and introduce new preemptive legislation.

Senator KASTEN. Senator Danforth.

The CHAIRMAN. Gentlemen, thank you very much for your testimony.

Mr. Sevier, please give my regards to the president of the ABA, my friend and constituent, John Shepherd.

Mr. SEVIER. I will. I understand he could not be here this morning. He was hoping to be.

The CHAIRMAN. I hope to see him in July and I think that the annual meeting is in Washington.

Mr. SEVIER. Also an extension in London. Yes, John is very busy right now.

The CHAIRMAN. I will be at the Washington part of it.

I would rather be at the London part.

I will tell you what I think, what I hope is happening with this bill. I think that heretofore, we have had three opposing groups—manufacturers, consumers, and lawyers. There is no way to pass a bill, any significant bill, where there are three opposing groups who have conflicting interests in the legislation.

Therefore, the effort now has been to try to pull two of those groups together in negotiations, they being the manufacturers and consumers. The theory is that the interests of the manufacturers and the interests of the consumers, while they are different, are not inherently opposed to each other.

The interest of the manufacturer is in certainty. The interest of the consumer is in speedy recovery. There is no necessary conflict between the two. And it is our hope that legislation can be put together on the basis of a consensus reached between those two groups.

I have not anticipated any participation by the legal profession in this effort. From your testimony, Mr. Sevier, it really will not be forthcoming except in very narrow areas such as what you have called latent occupational disease.

I think we will have to proceed without you, much as the Congress has had to proceed without Caspar Weinberger in determining what we are going to spend on defense.

Mr. **Sevier**. I do not know how to take the simile, Senator.

The **Chairman**. What's that?

Mr. **Sevier**. I said I don't know how to take the simile.

The **Chairman**. But I think that is what happened. He dealt himself out of the particular game and he is out of it. I would hope, though, that you might go back to John Shepherd and back to the ABA and at least raise the question of whether you want to be out of it because we have heard you; we do not agree with you. This is a national problem.

It is a national problem which is hurting business, hurting consumers, hurting our competitive position in the world market. And it is just insufferable.

I would hope that the ABA would be concerned that its whole image in the country is rapidly becoming symbolized by such efforts as the flight to Bhopal and that the bar is a profession, a service profession, and when the system is malfunctioning to the extent that everyone else who is here today assumes it is, then the bar should be part of the solution, not just the conservative holdout against a solution.

So I would hope you would take a look at it, but I am not holding my breath.

Mr. **Sevier**. Well, if I could just comment for a minute, Senator Danforth. In the number of years that I have been active in the American Bar Association, I have never seen a subject that has developed as much interest and has attracted as much attention in bar association deliberation in the house of delegates as the issue of product liability problem, as you have presented it, and this has been studied and certainly will continue to be studied.

This is not something that we feel we are through talking about it, et cetera, and I will certainly carry your message. But I believe that we have not just tried to take—ignoring it at all. And we have done this in the past. It is our judgment that there is another important aspect which is our system of common law which has to be protected because it protects the people in this country.

So thank you.

The **Chairman**. Thank you. But I would, I mean my own view is that there is clearly a problem here. I mean this is not just today's hearing. This has been going on for years. Senator Kasten is becoming an old man.

I mean consumers and business people together are clearly disadvantaged by this protracted system. I used to be in the practice of law. Fortunately they got me into politics before I could gum up the legal system too much.

But, you know, part of the object—I hate to say it, but probably—I don't know, maybe it raised ethical questions, but we used to represent defendants, the firms that I was in, more than plaintiffs, and one of the great tactics was just to delay matters, just keep the thing going.

And Ray in the Attorney General's office, that was clearly the basic strategy. I mean we would be just inundated by lawsuits, so what do you do? Why, here are my interrogatories, you know.

I think that it is just clearly a problem and everybody wants to go to law school now, so we have this glut of lawyers and they all, I guess, can keep themselves busy, but it certainly is not an efficient, smoothly running system.

Mr. **Sevier**. I may have some good news for you, Senator. The latest American Bar Association report says law school enrollments are down.

The **Chairman**. Ah, well, OK.

But thank you very much, gentlemen, for your participation this morning.

Thank you, Mr. Chairman.

Senator **Kasten**. I would like to make just one final comment. I first of all want to associate myself with the views of the chairman and say that in addition to the consumers and the manufacturers, there is a great interest in this legislation on behalf of labor. And we are making every effort to work toward the kind of consensus that the Senator from Missouri is talking about as we work with labor groups, consumer groups, and manufacturing groups.

And I want to add to what Senator Danforth just said, that it seems to me that it does not make sense for the people who have or theoretically should have the most knowledge about the system to simply deal themselves out of the negotiations by acting as if they do not recognize the problem.

So I would also invite the bar association and the trial lawyers to work with us toward an efficient system that will reduce costs, that will help not only consumers and manufacturers, but also organized labor. We are moving forward. We are going to develop a consensus. I feel more strongly today than ever that everyone recognizes a common thread in terms of the directions that we must go in and I look forward to working with everyone.

On behalf of the Consumer Subcommittee I would like to thank the witnesses that testified today. The record of the hearing will be held open for 2 weeks after our second hearing, which will be a week from today, June 25, for additional statements and so that additional questions may be submitted to witnesses to be answered for the record. I hope that you will also be able to get these answers back to the subcommittee as soon as possible within the allotted time period, as we will be submitting questions for the record.

Thank you very much. The hearing is closed.

[Whereupon, at 12:05 p.m., the hearing was adjourned.]

PRODUCT LIABILITY ACT AMENDMENTS

TUESDAY, JUNE 25, 1985

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SR-253, Russell Senate Office Building, Hon. John C. Danforth (chairman of the committee) presiding.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. I have an opening statement.

This morning the Consumer Subcommittee holds its second day of hearings on the amendments introduced by Senator Dodd and Senator Gorton to S. 100, the Product Liability Act. I am sure that many different views will be expressed today and that there will be disagreement about many aspects of the proposals before us. I am confident, however, that most of our witnesses will agree that the existing product liability system is not working and that something needs to be done.

We are faced with a system for compensation of personal injuries caused by defective products that does not work. It is a national problem that is hurting all of us; it is hurting consumers, hurting business, and hurting our competitive position in world markets. There are those who still prefer the refinements of the common law and who argue that product liability reform is not an appropriate subject for legislation. But crude as legislation sometimes is, I think it is perferable to the present situation.

To be sure, legislation is an imperfect, political solution that involves a balancing of interests. It is a solution that is based on consensus and compromise—not insistence on absolutes or perfection. But it can provide a workable alternative to the existing system that can provide significant benefits for all those involved.

I think that the proposals before us provide a sound basis for such a legislative solution, because they combine uniform product liability law with alternative no-fault claim systems for compensation. These proposals present us with a great opportunity and a challenge. They give us an opportunity to reform product liability law in a way that will further the different but not necessarily conflicting interests of consumers and manufacturers. We have an opportunity to address effectively and fairly the legitimate concerns of consumers, workers, product sellers, and manufacturers; to reduce transaction costs for everyone; to provide greater uniformity with respect to liability; to promote product safety; and to provide swift and more certain recovery for those injured by defective products.

The challenge before us is to take advantage of this opportunity and to reach the necessary consensus of support for such legislation. This is a difficult task that requires an understanding of common interests, the willingness to be open-minded, and the ability to compromise.

It is my hope that after these hearings we will be able to meet this challenge. In the weeks ahead, we will continue our efforts to foster the necessary consensus for comprehensive legislation that combines uniform product liability standards with an alternative compensation system. We will continue the meetings of the product liability working group. We will study carefully all the testimony we have received, and we will attempt to develop a proposal with a broad base of support.

If we are successful, we will schedule additional hearings on this measure soon after Labor Day, and we will seek to move ahead as expeditiously as possible with this important legislation.

This is a hearing with very distinguished witnesses on the subject of compensation ideas. Several of them have been introduced. Senator Dodd, Senator Gorton, have different ideas on compensation programs as a part of the product liability system.

I have said before that I hope we can pass a bill. I do not think that it is possible to pass a bill which reforms product liability unless there is a compensation alternative as part of the bill. Obviously, there are a variety of ideas and there are a variety which will be presented today on what makes sense as a compensation program.

My own hope would be that we would not insist on perfection, but would try to reach a consensus. It seems to me that there is one thing that is abundantly clear, and that is that the present system, the present product liability system, is terrible.

I think that this is a case where we have no place to go but up, and therefore I would hope that we could enact some legislation during this part of the process.

Senator Hollings, do you have any comments?

OPENING STATEMENT BY SENATOR HOLLINGS

Senator HOLLINGS. Well, I was not going to say anything until you said the product liability system was terrible.

And, of course, it really is not. It provides for compensation in the local jurisdiction. There are some runaway jury verdicts, but this is true for damage awards in general, not just in product liability. I am amazed as a lawyer of 40 years to see some of the things done in the State of California, but we continue to learn. The evolution of the substantive law of product liability is not the problem.

And if you look at the jurisdictions over the country, the multiplicity of requirements has existed for all of tort law, and we have existed over 200 years hale and hearty with the tort law.

I will start listing the industries to come, blue chip corporations to my State and my area, and we have far, far more important concerns. We had a shakedown cruise of product liability in the 1970's when insurance rates were out of hand. We passed the Risk Retention Act and the State legislatures have addressed various issues and gotten the kinks out. And as I see it now, there is no real reason for the Federal Government to come in with a comprehensive bill, particularly now.

The chairman's statement, we have got to get a bill—the truth of the matter is, if the bill is needed, it belongs over either in the Labor and Human Resources Committee on the basis of compensation or it belongs over in the Judiciary Committee with respect to the judicial systems and the whole body of tort law, but we have made political commitments to the Chamber of Commerce and business entities long before we came to this session. They came around; they saw me, they saw you. Some committed, and now they feel that it is a political thing and they have got to make a commitment.

We are in the wrong forum, with a need that really does not exist. The remedy being proposed, as it will be disclosed by some of the distinguished witnesses we have today, may be far worse than the ailment it is intended to correct.

So we will just sit and listen, but I will have to take exception about product liability. I guess the distinguished chairman does not like tort law. But it has brought safety to the living standards of America and created the highest safety standards in the world—we can discuss the lawyers' fees and whether it is defendants' or plaintiffs' attorneys receiving the fees and how much the injured party is receiving.

The whole comeuppance is, it has worked without causing any real national crisis, certainly no need for the Federal Government to comprehensively take over the State body of tort law at this time.

The CHAIRMAN. So, as I say, we are going to have to do a lot of compromising, Senator.

Senator Hollings is compromising by going to a Defense hearing.

Senator HOLLINGS. I will have to leave in a minute. You've got my schedule.

The CHAIRMAN. The first witness is Prof. Jeffrey O'Connell, John Allan Love Professor of Law, University of Virginia Law School.

Professor, thank you very much for being with us.

STATEMENT OF PROF. JEFFREY O'CONNELL, JOHN ALLAN LOVE PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. O'CONNELL. Senator, I thank you for having me.

Senator HOLLINGS. Do we have a copy of the gentleman's paper?

Mr. O'CONNELL. I have a copy here that I would be glad to provide you with.

I much appreciate your interest in pursuing this subject of product liability. I differ with Senator Hollings on whether or not it is a unique problem and worth pursuing, and I admire the Senate for pursuing it, and Senators Kasten and Danforth and their colleagues.

I would like to submit for the record my statement, as well as some Law Review writing which nobody has ever read, but perhaps in the record it will be read by some strange energetic person.

The CHAIRMAN. We will be happy to have them for our files.

Mr. O'Connell. These are the writings on which I base my testimony, which will be very brief.

I suggest to you that I do side with Senator Danforth in your brief colloquy. I think the tort system as a whole and as it manifests itself in products liability is an unmitigated disaster as an insurance mechanism, and I think that stems from three variables which are unique and which do not apply in other forms of insurance: Those three variables are: You do not pay the insurance until one determines who or what was at fault, which does not happen in any other form of insurance. We do not do that with life insurance or health insurance or fire insurance or disability insurance.

The result is that we spend huge amounts on lawyers on both sides, on expert witnesses, and on transaction costs to determine who or what was at fault, compared to the ease with which we pay every other form of insurance.

Not only that, we compound the problem by paying not only for economic loss which is relatively easy to tote up—especially if you pay periodically, which all other forms of insurance do except this one—but we pay for the economic value of noneconomic loss which is another huge variable, which lawyers can spend huge amounts of time arguing over. And all the while the lawyers are arguing about who or what was at fault and the value of pain and suffering, a very expensive meter is ticking.

I do not challenge the integrity of counsel on either side, given the incentives of the present system. They earn their money. Product liability cases are hard cases to prosecute and hard cases to defend, but we ought not to overlook the fact that they are hugely expensive, both to settle and to litigate.

Third, we compound the problem even further by doing something that no other insurance mechanism does. We pay in the tort system, regardless of the fact that the claimant has already been paid from other insurance. We pay the claimant two, three, four times. We do not care in the tort system how often he has been paid from health insurance or workers' comp., unless we compound the problem even further by doing something that other forms of insurance do, but not as badly as we do in tort—have subrogation rights wherein if the loss has been efficiently borne by one insurer on a no-fault basis, we turn around and spend huge amounts of money to retransfer that loss to another insurer. It is a wildly wasteful business to be covering losses at the bottom level two and three times, when we have tremendously uncompensated losses at the top.

If we sat down to design a bad system, we would end up with those three variables that the tort system dictates.

The result is highly quixotic payment, some people being paid vastly over their losses, some people not at all or very little, everybody waiting a long time before they are paid, and huge transaction costs in the course of payment.

The problems are particularly acute for products liability, where trying to decide whether a product is defective involves engineering testimony of the most arcane kind. Lawyers do not understand much engineering; engineers do not understand much English, never mind law.

And the result is you have these two warring camps trying desperately to understand each other's arcana, and once again the meter is ticking all the while, and there is a very seriously injured person waiting all the while—not months, but years, and the best lawyer in the world in the typical case cannot tell that client when he will be paid, what he will be paid, and if he will be paid.

And that is the definition of a disastrous insurance mechanism.

Well, what is the solution? You scarcely expect me to come here and rant on like this unless I had a solution, I suppose. The curious thing is that the problem was essentially solved 100 years ago by a person not generally thought to be the most farsighted and liberal person in the world. His name was Bismarck. And 100 years ago he said, in the first great wave of accidents that engulfed the industrial world, workplace accidents, he said there is no sense in forcing the injured employee to have to prove that the employer was at fault and that he, the employee, was free from it. And there is no sense in paying him vast sums in addition to his economic loss.

There were no collateral sources then. There were no other forms of insurance. But at a stroke, Bismarck wiped out those two variables that plagued tort law. No one pretends that workers' compensation is perfect. It is only perfect when you compare it to tort law. There is no rational person in the world, I suggest to you—except some trial lawyers—who would suggest that we abolish workers' compensation and replace it with common law liability for every industrial accident. No one would suggest that, no one does suggest it, and no one would be taken seriously if they did suggest it.

Note the debate is all the other way. Do we apply the workers' compensation principle to tort cases? Never do we debate applying the tort model back to workers' comp.

And we began to learn that lesson 50 years ago, with reference to the automobile: We enacted no-fault auto insurance. Once again, no one would pretend that no-fault auto insurance is perfect, but let me read to you the figures from New York as to what is the value of no-fault coverage versus tort coverage. And these figures can be replicated in other States from a recent DOT study.

In New York, everybody has to be covered for $50,000 of medical expense and wage loss from auto accidents, on a no-fault basis. It does not make any difference whether you were speeding or the other driver was not speeding. If you are in an accident and you suffer losses to the extent of $50,000, you get paid, no questions asked—periodically, as loss accrue—not for pain and suffering—for economic loss, $50,000.

You are also required to carry tort liability insurance of $10,000 which, of course, is highly contingent on one being able to prove a tort claim.

I want to read to you what the comparative cost is of no-fault benefits versus tort. Fifty thousand dollars' worth of benefits on a no-fault basis cost in 1983, the latest figures; published by the DOT, $46 a year. Do you know what $10,000 of tort liability cost? $118. I want you to think about those figures; 28 percent of the personal injury premium pays $50,000 automatically, but it takes 72 percent of the premium to possibly pay $10,000 under our lawyers' tort system.

Now, anybody who is defending the tort system in the face of those figures has a great burden. I grant you that auto cases are different from product cases, but the problem is even worse for product cases because it is relatively easy to try a typical auto accident—relatively, compared with product cases. You do not use expert witnesses to anything like the same extent.

It is also very hard to define the insured event for products liability. We cannot say that anytime anybody falls off a ladder, the ladder manufacturer will pay; anytime anybody burns his hand on a stove, the stove manufacturer will pay, regardless of fault. That would be a very forbidding and new liability. Somebody trips over a book, the publisher pays? It boggles the mind to think how you would define no-fault for products liability, a problem that the staff here have wrestled with—wrestled with and lost I might say, because it is very hard to define that insured event.

And that is why I suggest to you, for what it is worth, a bill which I have drafted, which is now before the House for medical malpractice. It could easily be extrapolated to products liability. I originally formulated it with an idea that it would be applied to all tort liability.

The bill says this. Whenever a claim is made against an alleged tort feasor, if the tort feasor within 180 days—much less than tort's years of waiting—if within the statutory period, 180 days, the defendant will tender to the claimant a commitment to pay the claimant's net economic loss periodically as it acrrues, including rehabilitation—rarely covered under any health insurance policy today—and wage loss—perhaps with a cap on it or not—that is a detail we can debate—but if the defendant will tender to the claimant promptly his net economic loss, the tort claim is foreclosed unless the defendant has acted intentionally, unless there has been criminal behavior. We can define that how we will.

Note what this bill does. It says to the defendant if you are going to spend more money on lawyers' fees defending this case than it would take to pay the net economic loss of the claimant, you are under an incentive, a strong incentive to come forward and make that tender. Bypass us lawyers, with all our incredible cumbersomeness, with all incredible expenses. If you can bypass us and pay the claimant for his real loss, God bless you; you do it, and the claim is foreclosed.

So anytime a defendant gets a claim, he is going to look at it and say, Can I use the money better to take care of this person's net economic loss, rather that fighting him about whether he should be paid?

In the case of the spurious case, in the case of the fraudulent claim, you would not tender. In the case where you do not face a realistic probability of liability, such that the legal expenses of defending are not great, you would not tender. But in a great mass of cases, there is this enormous incentive to pay the benefits that most insurance, rational insurance covers—net economic loss—with no incentive on the claimant to pad the claim, exaggerate the injury, to prolong the injury.

What was it Alfred Conard once said in the most telling indictment of the tort system one could have? He said recovery in the legal sense is inimical to recovery in the medical sense. What a terrible thing, that people are under incentive to stay injured in order to recover.

The bill could be amended if it seems one ought to give the claimant a choice to turn down these benefits. One could amend it to say that once a tender is made, the claimant can only recover for pain and suffering and not for his economic loss that he has turned down.

One could also provide that there could be a cap on pain and suffering. One could go back to the original S. 44 and put in the provisions which are very restrictive in tort recovery, relatively speaking, on the grounds that you are justified now in being restrictive on tort recovery when the claimant has had a chance to be paid for his net economic loss and has turned it down.

Then the restriction looks a lot more reasonable. I think you were right, Senator Danforth; it is unfair to rigidly restrict the rights of claimants to be paid under a system where it is already inordinately difficult to be paid, and that is why I have struggled to give defendants an incentive to come forward and take care of real losses.

Because I suggest to you in closing that it is the seriously injured victim we must keep in mind. The present system well serves everybody else in the system. Lawyers are well paid on the defense side and the plaintiff's side. Even the plaintiffs, with their so-called contingent fee, do not have to take cases that are not very likely to lead to recovery, and have a portfolio diversification such that if they lose one, they have 15 others.

Insurance companies complain and wring their hands, but they are still in business and they are still meeting at the Homestead. Defendants are insured, complaining, but a lot of manufacturers seem to meet at the Homestead as well. Seriously injured accident victims are not meeting at the Homestead. They are in desperate trouble.

And what do we do with them? We hand them a lottery ticket and say you may get paid 3 years, 4 years, 5 years from now, and when you do, pay 30, 40, 50, 60 percent goes to the lawyer—who has admittedly earned it by having to battle through such a difficult case.

Some of my friends in legal academe and in the bar assert that the tort liability system achieves deterrence. We have had workers' compensation which is a no-fault system for generations, with no one able to demonstrate convincingly that no-fault undercuts deterrence. No one has been able to demonstrate convincingly that no-fault auto insurance has lessened deterrence.

As long as we internalize substantial amounts of economic loss generated by economic activity, we achieve whatever deterrence we are going to achieve. What we can do is compensate people quickly and more fairly. We can do that. We know we can do it. We have done it under massive insurance arrangements before, and we can do it now. We can deter as well.

Thank you.

The CHAIRMAN. Professor, thank you very much. Under your idea, as I understand it, the defendant should make the election of paying only economic damages.

If he were not to make that election—he could do it in any and all product liability cases; correct?

Mr. O'CONNELL. Yes.

The CHAIRMAN. And economic damages would not include pain and suffering?

Mr. O'CONNELL. That is right.

The CHAIRMAN. And they would not include punitive damages.

Mr. O'CONNELL. They would not include punitive.

The CHAIRMAN. First, would that be a disincentive to safety in your opinion?

Mr. O'CONNELL. I think punitive damages—and we can discuss this—I think punitive damages today have become so quixotic and so indeterminant when they are awarded, that it is very hard to maintain they achieve deterrence.

If you talk to all the people in criminal law, Senator, they will tell you deterrence has to be achieved by two things: swift punishment and certain punishment. You have to know what your punishment is going to be, and it has got to happen quickly.

Product liability offers you the chance of maybe being punished 5 years now, and that is not deterrence. And I think you could leave punitive damages in for the criminal conduct, where it belongs. When you are talking punitive damages, you should be talking criminal or quasicriminal conduct, which is the marginal case, the very rare case.

The CHAIRMAN. So let's suppose that the defendant says nuts to that idea. My method of defending my case is to keep the case going as long as I can and wear down the other side. There are a lot of defendants who do that.

Mr. O'CONNELL. There are indeed, although I suggest to you that in large measure, the present system gives an incentive to do that, because if you come forward promptly today and make a generous offer early on, any good plaintiff's lawyer—and I scarcely blame them for behaving this way—says "we got 'em, we got 'em. We are not going to accept that 'small' offer; we are going to get eight times that. They must be in terrible trouble.

My system at least gives every defendant an incentive to say if I can spend money on injured people as opposed to lawyers, I gain by doing it.

One could, I suggest in the original article, have some sanctions on the defendant who does not make a tender. One could reverse the burden of proof, for example. One should not do what I think is done by some suggestions; namely, let the plaintiff recover two or three times his economic loss. I think any time you violate the principle of indemnity in insurance and pay people beyond their economic loss, and thereby encourage them to go out and incur medical bills or further wage loss, that is simply a violation of fundamental sound insurance principles.

The CHAIRMAN. In other words, the incentive under your idea, the incentive to the defendant would not be that the potential liability would be greater——

Mr. O'CONNELL. That is right. Although that——

The CHAIRMAN [continuing]. If he said nuts, and the normal tort system were followed.

Mr. O'CONNELL. Because my premise is that the incentive to pay promptly and get rid of the claim would be sufficienty great. But I grant you, indeed my original article suggested, it may be that sanctions for not making the tender should be introduced in the bill. And that is a perfectly rational thing to think about.

The CHAIRMAN. And those sanctions would be increasing the burden of proof; is that right?

Mr. O'CONNELL. That is lessening the burden of proof for the plaintiff. One might do that.

The CHAIRMAN. Lessening the burden of proof for the plaintiff.

Mr. O'CONNELL. One might do that. One might very well do that.

But let me tell you frankly, I think we are in a clime where it is extremely difficult to increase liability on defendants in products liability. I think the present economic clime and the insurance clime make it a very unwise thing for us to mandate, without knowing what we are getting into, more liability.

The CHAIRMAN. There should be no compensation for pain and suffering?

Mr. O'CONNELL. Not if there is this prompt payment of real loss. That is, pain and suffering can be paid if you do not make the tender.

The CHAIRMAN. Under any and all circumstances, even if it is excruciating pain and suffering?

Mr. O'CONNELL. Well, keep in mind, the more excruciating the pain is, Senator, the more analgesics will be needed, the more medical attention will be needed, and that will be paid for promptly. And that is where insurance dollars are paid best, because let's be frank about it, all the dollars in the world do not remove excruciating pain.

The CHAIRMAN. Do you think the insurance industry should welcome this kind of idea or should oppose it tooth and nail?

Mr. O'CONNELL. Well, keep in mind that it is hard to imagine a proposal which is less threatening to defendants—indeed, that is why it is criticized by some—because I have not asked them to take on any new commitment. I have simply said if you can use your dollars better, this bill encourages you to do it.

Let me tell you, without wishing to be unfair, I don't think the insurance industry is going to have much to say about reform. It is an industry which is not interested in change, and I don't think you are going to get much help from them.

I think you are going to have to draft a bill that makes sense and they are either going to be silent or complain, but they are probably not in a position to try to affect the result. They have usually not in the past, and they are probably not going to do it in the future.

The CHAIRMAN. I might say the bar has not exactly been placing garlands around——

Mr. O'CONNELL. I would agree that the two sources where you are not going to get help from are the bar and the insurance industry, both—and understandably, let's face it. I can speak easily for change as an academic without a commitment to either side. If I were a member of the bar or if I were running an insurance company, I might very well be far more timid than I am.

The CHAIRMAN. Senator Hollings.

Senator HOLLINGS. Why be more timid? I don't understand.

Mr. O'CONNELL. Well, I would say if I had an investment in the status quo, I would probably be more reluctant to change the status quo. But I don't.

Senator HOLLINGS. The status quo, as you describe it, would save the insurance company money.

Mr. O'CONNELL. Well, that is right. But my point is, they fear change qua change. The whole question, for example, Senator, of the effect of reduced premiums on their investment income. I mean they do not like the idea of paying net economic loss.

The insurance industry battles furiously to keep each side of the insurance industry paying for the loss, despite the fact that someone else has paid. That is a scandal, in my view, as a social matter. But the insurance industry obviously has an incentive to have as much premium income as they can, and if I were in the insurance industry, I might very well react to that same incentive.

Senator HOLLINGS. You have gotten one of the points about just coming in and paying the economic loss. What percentage would you say of product liability cases are settled without attorneys, without people running out and getting a lawyer to try the case to collect payment, determine payment time, and amount of damages.

Your approach to compensation assumes now we get rid of all of that. We have an hour's certainty and all injured parties will run down with the insurance company, rather than the lawyer.

Professor, what percentage of product liability claims are settled today without running down to the lawyer, with running to the insurance company or the product manufacturer and receiving——

Mr. O'CONNELL. I don't have figures, but I would venture it is infinitessimal.

Senator HOLLINGS. Infinitessimal?

Mr. O'CONNELL. Yes. I would suggest that today product liability claims are not being settled unless they are very large, because there is too much that you have to invest in the way of establishing the product as defective in order to make a claim. Oh, there may be trivial payments made for people who swallow snails out of coke bottles, but here again, the coke people defend those with great passion.

So that the trivial product liability claim is not at all a common occurrence. I have estimates—all they are is estimates because they are lawyers guessing—estimates that say unless a claim is worth $25,000 to $50,000 or more, no product liability claim is worth pursuing. You just can't invest in all the engineering testimony it takes to establish that that product was defective. So I suggest to you that the trivial product liability claim which is being amicably settled between the parties without lawyers is a rare occurrence, Senator.

Senator HOLLINGS. With respect to pain and suffering, like a Dalkon Shield type case where a young married woman now has lost her ability to reproduce—she is not working, she is a nonworking individual—what about that? Since there is no economic loss, there would be no pain and suffering there either; is that correct?

Mr. O'CONNELL. Yes, that is right, Senator. There are people who do suffer egregiously from injury, all kinds of injury today, who are not paid for that loss. All of us face the risk of some terrible illness or injury tomorrow for which we will not be paid.

I suggest, on balance—and we made this decision with reference to workers' compensation after the turn of the century—on the whole it is better to guarantee people their economic loss than to give that female that you speak of a lottery ticket where she may get vast amounts 5 or 6 years from now, and may get nothing. For example, if she has suffered loss of reproductive capacity, she may very well have a psychiatric problem, she may need counseling. Let's pay for the medical expense which is attributable to these injuries and pay it promptly and pay it with certainty, rather than pay large amounts of money to lawyers to litigate whether she has a right way down the road to a vast sum to pay her for noneconomic loss.

Senator HOLLINGS. Well, and you don't even give a lottery ticket. That would be removed.

Mr. O'CONNELL. Well, that is right. But I give her the assurance——

Senator HOLLINGS. And she gets nothing.

Mr. O'CONNELL. She would get her economic loss. Senator, I am suggesting to you every other——

Senator HOLLINGS. But there is no economic loss, is there?

Mr. O'CONNELL. Then I would say to you, Senator, under every other insurance mechanism we have in this country, if people do not suffer economic loss, they do not get paid. That is the essence of insurance, except in tort and some disability policies that pay derisory amounts of, you know, $5,000 for blindness or some amount that you and I would scorn.

So that it is not a rarity for insurance to say if you do not suffer economic loss, you do not get paid. If you don't die, you don't get paid life insurance. If you don't suffer medical expense, you don't get paid health insurance. If you don't suffer wage loss, you don't get sick leave. And I suggest that is a very sound premise for insurance, even though it means not paying people who have suffered psychically and who are not paid for that suffering. They join the rest of the human race with reference to insurance payments.

Senator HOLLINGS. Well, I think the Dalkon Shield punitive damage award has been quite an incentive for safety and what you call a lottery ticket would be looked upon by many in this particular field as an incentive for the manufacturer to exercise a higher degree of safety in producing his product.

But you think not.

Mr. O'CONNELL. Well, I would suggest to you, sir, that we have had a long experience with workers' compensation. We have had now a long experience with auto no-fault which do not pay for pain and suffering, and no one is able to demonstrate that we have more industrial accidents because we do not pay for pain and suffering than if we paid for pain and suffering. No one is able to demonstrate that.

So I am skeptical about the deterrent value of even a Dalkon Shield case. I would concede that the bill ought to include the right to pursue the tort case where there is criminal conduct. I suggest that the number of occasions for criminal conduct on the part of defendants in our society is very rare, but I will concede that people who commit crime ought to be exempt from tort liability. And my bill, the bill that I have drafted both for medical malpractice and for products, would clearly preserve that.

But I would narrowly limit tort liability for criminal or quasi-criminal conduct.

The CHAIRMAN. Senator Ford.

Senator FORD. I have no questions, Mr. Chairman. Thank you.

The CHAIRMAN. Senator Gorton.

Senator GORTON. Sorry that I haven't heard all of your testimony, Professor O'Connell, but I think I may have the drift of it.

At least in a world in which economic decisions predominate, would not the course of action you advocate simply provide a very real incentive for a manufacturer to make cost/benefit analysis with respect to a given product, whether it is the Dalkon Shield or, say, a Pinto—and say that it will be cheaper to pay off those economic losses, if they are reasonably predictable, than it will be to make the product safer?

If so, is that good or bad social policy?

Mr. O'CONNELL. I suggest any insurance mechanism gives the defendant that option. You are not going to get away, Senator Gorton, from people designing products saying "how safe can I make it and how much will it cost me to make it safe." No matter what system you are dealing with, that is the judgment that is going to be made.

My premise has been that if we have this vast pool of insurance dollars, it is far better to use them to pay people their loss, internalizing a lot of losses. People do not get out from under their obligations under my bill lightly. They have to take on a commitment to pay forever any economic loss stemming from that injury.

Look at workers' compensation rates in our society. They are very high, because that is the undertaking that employers have to take on. So I am not suggesting we give manufacturers a free ride. I am suggesting we give them certainty of their exposure for paying for the real loss of those who are injured in the course of using their products, and if you tell me that that will lead occasionally to economic judgments about how safe to make the product, I would say we are never going to get away from those judgments.

Senator GORTON. Well, let's look at it in a different fashion.

Can you give even—can you give any estimate, even a horseback estimate, as to the degree to which costs attributable to product liability would decline if your system were substituted for the present system?

Presumably those costs would be less than they are, but half as much, a quarter, 90 percent?

Mr. O'CONNELL. My hunch is that they would be in the range of 25–30 percent lower, maybe more, maybe less.

Senator GORTON. Twenty-five or thirty percent lower.

Mr. O'CONNELL. Yes. I think they would be lower. On the other hand, I think, to a dramatic extent, as those no-fault figures from Michigan indicate, the dollars would be used to pay people for their real losses, rather than lawyers to argue about how it happened.

Senator GORTON. Now, when you say 25 to 35 percent lower, you are using the whole transaction cost.

Mr. O'CONNELL. I am talking about premiums that an insurer bears. And, you know, I would say this. Would we say, Senator, that there should be no move on anybody's part to cut tort liability costs because that is going to lower incentive? Of course, we would not.

We want to lower costs. Supposing they pay less for steel. Is that going to increase injuries? The whole game is to try to cut costs.

Senator GORTON. Well, I assume that your follow-on answer to me is that if the decline in costs is only 25 or 30 to 35 percent, the incentive for safety is not going to be significantly lessened. Is that what you are saying?

Mr. O'CONNELL. Precisely. Because you have got public relations elements accompanying injuries. You have also got the commitment to have to pay people periodically for their losses for all time. I suggest to you that as long as we are internalizing substantial costs from accidents, we are deterring to an optimal extent that we can, as far as we can know. And whether it should be 110 percent of what we are now paying or 90 percent of what we are now paying or 60 percent of what we are now paying, or 130 percent, no one can know; and I suggest in the foreseeable future, no one will know.

So we better use those dollars better than we are using them now at the risk—you are absolutely right to raise it, Senator—at the risk that we may be lessening deterrence.

Senator GORTON. On another subject, you set up an option system. But as I read it, it is an option which is totally at the discretion of the manufacturer——

Mr. O'CONNELL. Absolutely right, sir.

Senator GORTON [continuing]. The defendant in the case. How does that help a claimant who is primarily interested in a quick recovery of out-of-pocket losses?

Mr. O'CONNELL. Well, because the defendant is given a very real incentive to come forward and pay his real economic losses promptly. I might say, in answer to Senator Danforth that the bill in H.R. 5400 does say that if the defendant does not—and this answers your question, Senator Danforth on an incentive if the defendant does not make an offer—the bill says, and I think it is a reasonable provision, that if the defendant does not tender, he at least offers the claimant a right to have arbitrated within 90 days his right to net economic loss based on fault.

That is, there would be an assurance of either, a prompt hearing based on fault or payment of net economic loss. A claimant would not have to take that hearing if he didn't want to. That is, he could pursue his tort claim, but the defendant who does not tender at least would have to give up the right to delay a hearing on whether or not payment of net economic loss is due based on fault.

And I think that is a significant advantage, because if you turn to the seriously injured person, it is the long delay and uncertainty which is intolerable. People who are seriously injured are risk-averse. As I say, everybody else can afford to wait. The lawyers can afford to wait. Insurance companies can afford to wait. Defendants can afford to wait. The less seriously injured people can afford to wait.

And such a bill makes it likely that we can decrease that anxiety without writing a blank check here in this room and saying oh, hell, maybe it will cost more; let's not worry about it.

I don't think we want to do that. I don't think we can do that, responsibly. So what I think I am trying to do is get those dollars more promptly into the hands of people who are seriously injured.

That is my aim and I suggest to you in all due respect, Senator Danforth, that it ought to be the aim of the Senate.

Thank you.

The CHAIRMAN. Professor, thank you very much.

We next have a panel of four law professors. I wonder if you could stay at the table, too. They will give their testimony, but you might like to answer some questions.

Mr. O'CONNELL. Sure.

The CHAIRMAN. Prof. Page Keeton, the University of Texas; Prof. George Priest, Yale Law School; Prof. Andrew Popper, American University Law School; Prof. Martin Shapo, Northwestern University Law School.

Gentlemen, thank you very much. I want to read into the record before you proceed some excerpts from a letter from another law professor, Guido Calabresi of Yale Law School. The letter was written to Mr. Blair Bolles on June 14, 1985.

> My own view is that it is most important that a decent bill go through, and I will emphasize this to Senators Danforth, Dodd, and Gorton. As to what bill has the greatest chance of actually being enacted and whether any combination of bills has a better chance than the individual bills, that I think I had better leave to them. When we academics try to predict what is politically acceptable, we usually blotch it royally.
>
> As a result, if I am able to get into the process, what I mean to say is: (1) something ought to be done; (2) what I would do, were I able simply to enact a reform bill on my own, probably would include some form of automatic and limited no-fault payment in some clearly-defined categories of cases.
>
> I would then reiterate the importance of not having the chase for perfection keep us from getting limited improvements, and so would ask for their political judgment as to what they thought would go through.
>
> I have suggested a three-part approach which is essentially what I would do, were I doing it. The first part is a bill which specifies automatic and limited recovery as described above. The Dodd bill has certain problems from my point of view, but represents an approach of this sort.
>
> The second part would permit anyone who is injured to refuse such compensation and sue a manufacturer, et cetera. But then real fault would be needed; that is, the burden to be met in order to get recovery of a non-scheduled sort would have to be, as I have repeatedly said, at least as great as that of the Kasten bill.
>
> The third part would permit the manufacturer, et cetera, to refuse to offer compensation on a series of grounds. For example, lack of causation, unusual use of a product, something akin to a modern assumption of risk, et cetera; all situations which would represent for me instances in which the injured party was in a better position to decide for safety than the alleged injurer.
>
> For reasons which are too complicated to go into here, I probably would not include plaintiff negligence as against assumption of risk as a defense, and I might allow partial recovery in cases where causation was shown by statistical means. But how that added limitation on damages would work is also too complicated to go into in this letter.
>
> If the defenses didn't hold up, the alleged injurer would then pay on a no-fault schedule basis, but the schedule would be considerably more generous than provided for in the initial approach.
>
> The point of all this is to induce most such cases to be settled cheaply on the basis of a workmens compensation type schedule, but to allow either party to opt out, knowing that if they opted out they would have a significant risk of doing less well.
>
> In other words, in cases of real fault, plaintiffs would have an incentive to reject compensation. In cases of lack of causation, assumption of risk, et cetera, defendants

would have incentives not to offer compensation. Neither, however, would be likely to do this in the ordinary run of cases which today are so expensive and wasteful.

The Kasten bill by itself doesn't give such incentives and would be mangled in the courts, even were it to be enacted. For these reasons I signed the list of people opposing the bill. But as I have also repeatedly said, I dislike the existing situation at least as much.

That is the letter from Professor Calabresi.

Gentlemen, if there is no objection from any of you, let's proceed in the order in which your names appear on the list of witnesses.

Professor Keeton.

STATEMENTS OF PROF. PAGE KEETON, THE UNIVERSITY OF TEXAS AT AUSTIN SCHOOL OF LAW; PROF. GEORGE PRIEST, YALE LAW SCHOOL; PROF. ANDREW F. POPPER, PROFESSOR OF LAW, THE AMERICAN UNIVERSITY; AND PROF. MARSHALL S. SHAPO, VOSE PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. Keeton. Mr. Chairman, members of the subcommittee, let me say at the outset that I reacted quite favorably to Senator Gorton's objective which is to attack what I consider to be the principal problem that has developed with respect to personal injury litigation. And this problem is not limited to product liability claims. This has to do with damages and not the substantive rules of tort liability.

Punitive damages are being awarded on the basis of a vague standard for the kind of misconduct required, variously referred to as gross negligence, recklessness, or conscious indifference, and often the same evidence that gets to the jury on negligence is regarded by the courts as sufficient to get to the jury for punitive damages.

Many courts have no guidelines whatesoever for fixing the amount of these punitive damages, no maximum and no other guidelines. So that it is not abnormal for an amount of $16 to $20 million of punitive damages in a case where actual damages is around $3 million or more.

And I think this does present a serious problem; even if the procedure being followed accords with due process (and there are certainly due process arguments that can be made here) it is nevertheless a very serious problem.

I applaud the proposal for a study group on product disability claims. But the whole subject of punitive damages, it seems to me, should be given to this group and not just a limited punitive damage proposal.

I would also say that damage award for pain and suffering—and especially in wrongful death cases—seem to me to be getting completely out of hand, pursuant to which survivors can recover for, at least in some courts, in separate items, damages for loss of so-called society, damages for so-called mental anguish, damages for so-called bereavement. And this constitutes duplication of damages for one type of loan, serious emotional disturbance.

And sometimes a sum should be granted for that, but not in this way. My point is, that it is the subject of damages that is the problem.

Senator Gorton's bill would not substantially change product liability law substantively. It provides alternate routes for the victim of dangerously defective products: (1) the Federal cause of action for compensation benefit, any (2) a State cause of action pretty much on the basis of the law as it is.

Thus, the victim would have alternative procedures and the object of this is to induce him to take the Federal route and then only have no recourse otherwise.

Is that my light that is on?

The CHAIRMAN. Yes, sir, it is still green.

Mr. KEETON. All right.

For reasons set forth in some of my criticisms of Senate bill 100, I would recommend against including in the bill sections 209 and 211. In other words, I would oppose preempting State law with respect to those matters.

Section 209 relates to joint and several liability and to the problem of allocating cost of accidents between multiple tort feasors. That is a complex problem and any effort to do that in products liability alone would not be successful.

I think that this whole subject should be left to the States to work out pursuant to State action in this regard.

And section 211 relates to retailers' liability, and I think that is a rather complicated problem that we can get into in the question and answer session, but I would simply leave those matters to be dealt with by State law. But on the whole, I would tend to support Senator Danforth's proposal.

Senator Dodd's amendment is substantially different and I will have to forego comment on that.

[The statement follows:]

STATEMENT OF W. PAGE KEETON, UNIVERSITY OF TEXAS AT AUSTIN SCHOOL OF LAW, AUSTIN, TX

COMMENTS ON S. 100, GENERAL OBSERVATIONS

I am opposed to either Federal or state codification of products liability law. This does not mean opposition to special federal legislation directed at a special problem, such as losses from occupational diseases, allocation of losses as between federal government and contractors who supply products to the federal government (agent orange situations), and problems related to the assessment of punitive damages. There are some questions such as these that can only be, or best be, dealt with by the Congress. That part of tort law that deals with injuries and death arising out of accidents is primarily concerned with shifting losses from those who are victimized in these accidents to those whose conduct can be regarded as a cause and who in fairness and justice ought to bear all or a part of these losses. In short, tort law deals with the allocation of the costs of accidents between victims, users of products, and those who supply products to users. It is the function of tort law to decide when and from whom an injured person can recover all or a portion of the loss which he or she has suffered.

Fairness and justice in the allocation of costs of accidents between victims, users of products, and suppliers of products can best be achieved when an injured party, users of products involved in an accident, and suppliers of products involved in that accident can all be brought into court and their respective contributions to the accident ascertained.

Historically, the supreme court of each state, in the light of its procedural system, has decided what the doctrinal rules, statements, and principles should be. This has meant that tort law has been made and is subject to change by the state supreme court of each state and it is my judgment that a revolutionary change such as that proposed is not in the public interest. There is no compelling need for uniformity about how best to achieve fairness and justice in the allocation of the costs of accidents. There is much to be said for the position that experience with different solutions will ultimately result in a consensus that will be the best. Moreover, the adversary system that results in the subjection of the doctrinal rules to careful scrutiny with concrete situations involved provides the kind of flexibility that is not possible to achieve through codification of a large part of the tort law by way of the legislative process.

Many accidents are attributable to negligence of victim, conduct of one or more users (including those who use hazardous products) and conduct of sellers of products that prove to be defective or hazardous. The doctrinal rules and standards with respect to the responsibilities of victims, users of products, and suppliers of products should be made and subject to change by the supreme court of each state.

Federal codification of tort law on products liability would in my judgment make it quite difficult to effectuate a tort system for a particular state that would be fair and equitable. It would bring about spurious interpretations to meet special situations and conflicts in interpretations. This is in contrast to what would happen when the courts are confronted with needed changes in the law. An exception or a qualification is made, or the law is overruled. I believe that 50 state interpretations on federal product liability standards will create much uncertainty for many years and will result in unsettling the law in many states where the law has become reasonably well-settled. I believe S. 100 will increase litigation costs as indicated hereafter.

One serious objection to S. 100 relates to defenses. If fairness as between users and suppliers is to be achieved, defenses must be the same. Many states have abolished assumption of the risk as a defense in a negligence case in the absence of express assumption of the risk. This bill would establish several defenses, including assumption of the risk, in addition to contributory negligence, and would make it virtually impossible for a state to work out a comparative fault statute properly allocating costs of accidents between a victim who assumed the risk but was not negligent, a user-defendant who had no assumed-risk defense, and a supplier who was provided with this defense. More will be said about this later.

I am convinced from a study of this bill that its passage would result in a vast increase in litigation. It would unsettle settled law in a vast majority of the states for many years. Specific observations are set forth below.

THE ELIMINATION OF STRICT LIABILITY FOR SELLING A PRODUCT THAT IS DANGEROUSLY DEFECTIVE BECAUSE OF THE WAY IT WAS DESIGNED OR FORMULATED

Virtually all states now recognize that a product can be defective, at the time of sale, in the kind of way that makes it unreasonably dangerous, and therefore dangerously defective, for one or the other of three reasons: (1) a flaw in the product or a construction defect; (2) a failure by the producer or assembler of a product to warn or adequately to warn of a risk or hazard related to the way the product was designed; or (3) a defective design.

It is also now generally recognized that the sale of a dangerously defective product subjects a manufacturer or producer to strict liability, i.e., liability without proof of negligence. This simply means that the victim is only required to impugn the product; he is not required to impugn the conduct of the maker.

Several reasons have led the courts to this position. One of the principal reasons is a practical or institutional reason. Proof of fault in this area is difficult even when it exists. The kind of discovery that is necessary to prove that the manufacturer should have known about a design hazard and the magnitude thereof is often quite expensive and the costs of litigation (so-called transaction costs) in proving negligence are quite substantial. Indeed, a return to the requirement that negligence must be proved will increase the costs of litigation.

A second reason is based on fairness and justice. It is based on the idea or notion that the costs of accidents due to dangerously defective products should be borne by the manufacturer or producer. It is based on the theory that generally speaking the manufacturer is in the better position to avoid accidents due to defective products and to bear the costs of accidents after they occur. It is most important to note that a manufacturer is not subject to absolute liability; only to liability for selling a defective product.

The third reason commonly given in support of the elimination of negligence is closely related to the first. It is that the cause of accident prevention will best be served by the elimination of the difficult burden of proving negligence. The fact that a victim is often unable for financial and other reasons to prove negligence weakens the accident prevention objective of the tort action for damages based on negligence.

There are two primary reasons under the decisions for concluding that a product can be found to be unreasonably dangerous and therefore dangerously defective. These are that (1) the harmful consequences of an assembled or fabricated product as designed outweighed all the benefits; and (2) although the harmful consequences did not outweigh the benefits, there was a technological and economically feasible way, at the time of sale, to design the product with less harmful consequences.

The primary difference between the bill as drawn and the law as it is in most states relates not to the importance of weighing danger against utility but rather whether the manufacturer's liability should be based on what it perceived or ought to have perceived the danger and the benefits to be as to be distinguished from what they actually were. A substantial number of drugs have been withdrawn from the market after a protracted period of use on people. This means, generally speaking, that the harmful consequences from the use of what may have been thought to be a great product and a boon to humanity actually caused so much harm as to outweigh what the actual benefits proved to be. Many automobile and other products are recalled after a protracted period for the purpose of correcting a design. These are often cases where, at the time the product was sold, the manufacturer did not perceive, and arguably could not in the exercise of ordinary care have perceived, that the product was so dangerous. Evidence related to danger-in-fact (such as a series of accidents after the sale of the product, a change in design, or a recall) can very well be regarded as admissible to establish a dangerously defective product when such evidence would not be admissible to establish that the defendant should have perceived the danger.

STATE OF THE ART IN DESIGNING A PRODUCT IN THE SENSE OF THE CUSTOMARY WAY

The bill as drawn appears to define negligence in such a way as to mean that conformity to the customary way of an industry in designing a product would be conclusive that a manufacturer was not negligent. This is a serious aspect of the bill.

Under Section 5(b)(1) of the bill, it is provided that a product is unreasonably dangerous in design or formulation if:

(A) The manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm; and

(B) A reasonably prudent person in the same or similar circumstances would not have manufactured the product or used the design or formulation that the manufacturer used.

Then in Section 2 on "Definition," it is provided that: (4) "exercise of reasonable prudence" includes conduct of an ordinary person or class of persons in the same or similar circumstances, exercising the care, attention, knowledge, intelligence, and judgment that society requires of its members in the protection of their own interests and the interests of others.

Then in Section 5(b)(1) B, it is provided that a product is unreasonably dangerous in design if a reasonably prudent person in the same or similar circumstances would not have manufactured the product or used the design or formulation that the manufacturer used. It is unclear to me why "class of persons" was used unless it was meant to protect a manufacturer from a claim of negligence by proving that all or most of the manufacturers of an airplane, motorboat, etc., designed the product as the defendant designed it. I realize the section could mean nothing, since it qualifies everything in the last clause by stating that reasonable prudence includes exercising the care, attention, etc., "that society requires of its members for the protection of their own interests and interests of others." Under the law of negligence, society requires of a person what the courts say it requires of a person. Any attempt in a statute to define negligence in any greater detail than stating that it is the failure to exercise reasonable care is a mistake. Courts have articulated the standard of care in different ways, and it would be better to leave to the state supreme court the precise way to charge the jury as regards the particular activity involved. It is enough to say here that nearly all courts have held that custom of a class does not establish the proper standard, except in certain areas, since the pressures of competition can cause the customary way to be less safe than it ought to be.

THE DEFINITION OF PRODUCT AND PRODUCT SELLER

These definitions illustrate the difficulty with attempting to formulate all the law of product liability in a detailed code. These definitions appear to be an attempt at codification of existing law, and thus leads to litigation over the meaning of words rather than to the more important question of whether negligence or strict liability should be applicable with respect to the kind of person and the kind of transactions that are involved. The statute is made applicable only to products sold or leased to persons for "commercial or personal use." Why not just use? This can result in litigation. The distinction between one who renders a professional service and one who renders a service such as a mechanic or a beautician is again one that is difficult to make, and the ultimate question in cases of this kind is whether the defendant is the kind of enterpriser that should be subject to strict liability. I realize this is simply an effort at condification of the existing judge-made rules on this subject. But judge-made rules can be altered to meet new problems. What about the automobile dealer who in repairing a car supplies both service and parts and charges separately? These are questions best left to the courts for resolution rather than by way of having an inflexible code rule and especially one as ambiguous as a "professional" service rule is. Virtually all persons rendering service profess special technical skill and knowledge.

OBVIOUS DESIGN HAZARDS

Under the bill as framed, a product can be unreasonably dangerous as designed pursuant to Section 5(b)(1)(D), and yet not be unreasonably dangerous under Section 5(2). So, in effect, the manufacturer's duty of care on a negilgence theory as that theory is expounded in the bill does not extend to guarding against (1) an "unavoidably dangerous product" or (2) an "aspect of a product which was an inherent characteristic of the product and which would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community."

This means, in the first place, that in the case of an industrial product a manufacturer is not subject to liability for obvious dangers related to the failure to have adequate safeguards to prevent injuries and death related to moving parts. This is no longer the law in the vast majority of the states, whether or not liability is based on a theory of strict liability or negligence. Prior to the development of strict liability in tort based on the sale of a product that was defective in the kind of way that made it unreasonably dangerous—a development that has come about largely since 1960—a manufacturer could satisfy any duty of care with respect to design hazards by taking proper precautions to keep purchasers-for-use informed about the risks or hazards related to the inherent dangers of products. One central idea is that competition and the market place is the best means for giving the kind of optimal safety that is needed. Prosser and Keeton on Torts (5th Ed. 1984), page 689. It was then the law that there would be no liability for harm resulting from obvious dangers whether on a failure to warn basis or on a design defect basis. But the vast majority of courts today would subject the manufacturer to liability for obvious design hazards when there is proof of a feasible way to eliminate the hazard. This would certainly be true of industrial products that are unreasonably dangerous as a consequence of an obvious defect. One of the leading cases on this is *Micallef* v. *Miehle Co.*, 348 N.E.2d 802 (N.Y. 1976), decided by the New York Court of Appeals and overruling the earlier decision of *Campo* v. *Scofield*, 95 N.E.2d 802 (N.Y. 1950).

I do not subscribe to the position that industrial employers (who are subject to liability only under the workers compensation system) and manufacturers will, under a free market, provide the kind of safety at the workplace that should be maintained.

There is another serious difficulty with the "obvious danger" rule. It provides another decision point and thus the rule promotes litigation over the issue of whether or not the danger is to be regarded as obvious. Transaction costs are increased by such a rule. All of this is not to say that where a purchaser who is under no economic coercion bargains with a manufacturer and agrees expressly or impliedly to assume the risk—such as in the case of cigarettes—should not be allowed to do so. That is not a question that needs to be answered.

THE UNAVOIDABLY DANGEROUS PRODUCT

Under this bill, the defendant could not be subjected to liability if the harm was caused by an unavoidably dangerous product. The fact that a product is unavoidably dangerous does not mean that defendant could not be negligent in selling the same. Of course, a good drug or a vaccine can have unavoidable side effects, but if the unavoidable side effects outweigh the benefits, the seller should bear the costs. A manufacturer can be grossly negligent in continuing to sell an unreasonably dangerous product after he obtains knowledge that the product is causing great harm. This term as used in the commentary to Section 402A of the Second Restatement of Torts was only meant to say that a manufacturer would not be liable for unavoidable harm resulting from a good product.

FAILURE TO WARN AND FAILURE ADEQUATELY TO WARN

Section 6 on product warnings or instructions sets forth existing law in virtually all states on the subject of warnings. A claimant who seeks recovery on this theory must, according to the generally accepted view, prove that the manufacturer was negligent. See Prosser and Keeton on Torts (5th Ed. 1984), page 697. It is a ground for recovery in many cases and is probably the most difficult problem for a manufacturer. There is hardly any warning given that cannot be argued as being inadequate. While it is often said that a product can be defective as marketed because of a failure adequately to warn of a risk, there is no liability for failure to warn of a risk unless the manufacturer knew or should have known in the exercise of ordinary care of the risk. A recent holding to the contrary is that of the New Jersey court in *Beshada* v. *Johns-Manville Products Corp.*; 447 A.2d 539 (N.J. 1982).

PRODUCT SELLERS OTHER THAN MANUFACTURERS

Under the bill as proposed, those who resell, such as wholesalers and retailers, are subject to liability only in a negligence theory except when (1) the manufacturer is not subject to service of process under the laws of the state in which the action is brought or (2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

This changes the law in the great majority of states. Under the U.C.C., a retailer is subject to liability on a warranty theory to purchasers and third-party beneficiaries. Very few courts in passing the U.C.C. changed this. Moreover, in most states the retailer is subject to strict liability in tort, pursuant to the position taken by the ALI in Section 402A of the Second Restatement of Torts. This tort liability extends to all those who would likely be harmed by a defeat of the kind that is proven.

Flaws. Retailers provide a variety of functions in the marketing and distributing processes. They often perform certain functions by way of making products such as automobiles ready for delivery. They install many products. In the course of providing these functions, flaws are created. Moreover, quite frequently, tires blow out, water heaters explode, and bottles break under such circumstances as to indicate that there was a flaw at the time the retailer surrendered possession. But the accident often destroys the evidence and prevents an identification of the precise condition that caused the accident. Under the bill, as drawn, plaintiff would be unable to recover against anyone because the retailer would not be subject to strict liability since it could not be established that its negligence was a proximate cause of the occurrence. The plaintiff could not recover against the manufacturer since it could not be established by a preponderance of the evidence that the flaw was present when the product (tire, boiler, bottle) was sold by the manufacturer. Probably the best solution to this problem would be a type of alternative liability pursuant to which the court would hold, under an alternative liability theory, that since the flaw in all probability was created either by the manufacturer or the retailer, each would be subject to entire liability with a right of contribution from the other.

As to design defects and construction defects, the primary responsibility should be that of the manufacturer, but the bill assumes, however, that there is no justification for imposing any type of vicarious liability on a retailer unless recovery from the manufacturer is difficult because of inability to obtain jurisdiction in a convenient forum or because of insolvency. But the question is who should have the responsibility for obtaining a judgment against the manufacturer. The bill as drafted invites litigation over whether the manufacturer is subject to service of process in the state where the action is brought, and whether the claimant "would" be able to enforce a judgment. The retailer is in a far superior position to that of the consumer purchaser in negotiating a settlement with the manufacturer without expensive and time-consuming litigation.

COMPARATIVE RESPONSIBILITY—SECTION 9

This is without doubt the most questionable section of the bill. It will result in confusion and complexity and bring about much litigation in an area that is becoming fairly well-settled in each state. This does not mean that the law is uniform from state to state, but it is fairly well-settled in each state. Moreover, it is not as important that there be uniformity as it is that there be certainty, so that cases can be settled in the light of established law.

There is no way for the Congress to provide detailed legislation about determining the responsibility of a manufacturer without affecting the entire tort system of a particular state. This proposal would do so, even though it only purports to deal with product liability actions.

Recently, the Supreme Court of Texas adopted a comprehensive comparative responsibility system; the adoption of this bill would completely undermine it. There are numerous problems with this portion of the bill. I will identify a few.

(1) Assumption of the risk as a defense. Assumption of the risk, which is a kind of consent defense rather than a fault or negligence defense, has been abolished in those states that have adopted a comparative negligence or fault system. It has been abolished—both for negligent actions brought against users as well as strict liability and negligent actions brought against sellers of products. This is not to say that a party to the contract cannot by contract expressly agree to assume the risk of harm from negligent or other tortious conduct. That is a separate and difficult matter, but that is the kind of assumption of the risk which would (if not against public policy and void for that reason) completely bar recovery. But under the bill as drawn, plaintiff's recovery would be diminished by the amount of responsibility allocated for his reasonable conduct in exposing himself to an appreciated danger. Thus, the employee who exposed himself to an appreciated danger attributable to a defectively designed or defectively manufactured industrial machine would have recovery diminished.

If this bill were passed, assumption of the risk would be restored as a defense to a product liability action. Would it be restored as a defense to a claim made against a negligent user in the same suit? If not, how is "responsibility" to be allocated? Much tort litigation today is multiple party litigation. Claims are brought against both sellers and users in the same suit, and it can often be found that the tortious conduct of the user of a defective car, the tortious conduct of the supplier of a defective car, and the tortious conduct of the user of another vehicle were all proximate causes of an accident bringing about a single and indivisible injury. In such a case, a fair and just allocation of the costs of the accident cannot be made unless the defenses based on the victim's conduct are the same as to negligent users and strictly liable or negligent suppliers.

(2) Misuse of a product and alteration of a product attributable to persons who are not parties to the lawsuit. This is surely the most questionable portion of the bill. In determining what 100 percent of the responsibility should be for an injury, the bill requires that misuse of a product by one who is not a party to the suit is to be included (Section 9(b)(1)(B)). It is then provided that plaintiff's recovery is to be diminished by the percentage of responsibility attributable not only to the plaintiff but to misuse and alteration by persons not parties to the suit (Section 9(b)(3)) and who may not be legally liable. I consider this to be completely unsound.

(3) Negligent use by one who is not legally liable. It is not clear to me what is intended here. Suppose the following case:

Host driver—30 percent (negligent).

Passenger guest victim—10 percent (negligent); $2,000,000 damages.

Truck driver—30 percent (negligent).

Manufacturer of car—30 percent (defective).

I wish to assume that there was a collision proximately caused by a negligent driver of a car with a defective gas tank and a trucker proceeding at an excessive rate of speed. The passenger-guest is severely burned when the car burst into flames as a consequence of a defectively designed gas tank. It appears that under Section 9(g) plaintiff would recover only 60 percent of his damages. Under the statutes and compensation schemes of most states, the negligence of one not legally liable should not be considered. Plaintiff should recover 6/7ths of his total damages or approximately 85 percent.

Injured Employees. When an employee is injured in the course of employment and benefits are received under a state or federal workers compensation law, the bill appears to me to reach a desirable result. Moreover, federal legislation is justified in this situation in order to eliminate the unfairness that now exists, particularly as a result of the fact that under the law in many states the employer is subrogated to the extent of the amount payable under the compensation scheme to the employee's cause of action against the manufacturer, even when the employer's negligence was a proximate cause of the industrial accident. Legislation is needed.

PUNITIVE DAMAGES

This is a specific problem with respect to which legislation, and federal legislation in particular, is needed. The court made standard of recklessness or conscious indifference is a rather vague concept on the basis of which to punish. Of course, it is used in the criminal law, especially in the context of criminal homicide. But I subscribe to any reasonable effort to minimize the unsound social and economic effects brought about by excessive awards for punitive damages, with very little control being exercised over the jury by either the trial or appellate courts. It is my judgment that the English rules on this matter could well be adopted. I suggest research in this area.

PRODUCT LIABILITY REVIEW PANEL

The proposal for a product liability review panel to study certain specific problems, such as the proper way to go about providing adequate compensation for occupational diseases and perhaps some other toxic torts, is, it seems to me, a good one.

COMMENTS ON DODD AMENDMENT TO S. 100

I have always been skeptical of any proposal in this or other areas of tort law that attempts to make available to victims alternative compensation systems, one which is based on proof of negligence or product defect with unlimited recovery and the other of which is a no-fault system based on a limited recovery.

On the whole, it is my judgment that Senator Dodds proposal, which is based to considerable extent on provocative and thoughtful proposals of Jeffrey O'Connell, would substantially increase the total costs of accidents that would be borne by manufacturers, some of which, from a social and economic point of view, ought not to be regarded as costs for which a manufacturer should be responsible. Litigation costs with respect to product liability would not, in my opinion, be substantially reduced and claimants would be able to obtain compensation for many injuries resulting from hazardous conditions of non-defective products that are not compensable under existing law.

Senator Dodd's purpose is to provide a simple alternative to a lawsuit for recovering damages. He states: "In essence, an injured person could recover damages for econmic losses simply by filing a claim against the manufacturer and showing that the manufacturer's product was responsible for the injury and not the conduct of the injured person. Alternatively, the injured person could continue to seek traditional tort damages. . . ."

It would seem that under the system proposed, victims represented by able trial lawyers normally choose the tort system if after discovery it appeared that recovery would be likely by way of proving negligence in the sale of a dangerouly defective product.

The tremendous increase in product liability claims since about 1960 has been due only in part to the fact that recovery is obtainable without proof of negligence and on proof that the product was dangerously defective at the time of sale. It has resulted more than (1) greater sophistication of the trial bar in dealing with the multiple causes for accidents, and (2) the abrogation of the rule that a manufacturer's duty of cars in the sale of a product with a design hazard could be fully satisfied by an adequate warning. It was as a result of the latter change that product designs came to be evaluated.

Under Senator Dodd's amendment, if a claimant seeks a recovery by way of the common law tort system, plaintiff would be required to prove negligence. Except for three of four states at most, plaintiff must under existing law prove negligence as a basic for recovery for failure to warn or adequately to warn. As regards construction defects or flaws, the same circumstantial evidence that is required to prove that a construction defect caused an accident will often be sufficient to give rise to an inference of negligence (res ipsa loquitur). As regards design hazards, in all but a small percentage of the cases, the danger (and the magnitude of it) from the way a product was designed was known or quite clearly should have been known. Therefore, in most cases, the evidence required to prove that a product was dangerously defective is sufficient evidence to get to the jury on negligence.

It is, therefore, my judgment that victims will choose the tort system in at least 75% of the cases, where it appears to a trial lawyer that more likely than not recovery will be obtainable on a negligence theory. Since the very purpose of the alternative claims procedure that Senator Dodd proposed would be to expand the area within which a victim can obtain some compensation, there will be a very substantial increase in the volume of compensable claims even though some of them will only be for economic losses. Will not the social costs of internalizing the costs of accidents in this way to the manufacturer outweigh all the benefits of providing compensation to those who need it? It is imposing costs on the manufacturer that should be borne either by victims or through some kind of a welfare system.

Since the volume of claims made under the tort system will not be materially altered, and since there will be a substantial increase of claims pursuant to the no-fault and non-defective product scheme, the costs of accidents attributable to product hazards will be greatly increased.

It is quite important to observe that under the new claims procedure that is proposed, it is only necessary to prove that an unsafe condition of a product was a proximate cause of an injury, and by "unsafe" is simply meant any hazard that caused the accident while the product is being used in the normal way. Is is in the public interest to require manufacturers of drugs to compensate for all the side effects of drugs? This would be a very big change in the law. The only exceptions would be when (1) the injury was caused by an open and obvious danger, or (2) when the injury was caused by an alteration by claimant, or (3) when the injury was the result of claimant's unreasonable use with appreciation that the product was unreasonably dangerous, or (4) when the injury was caused by claimant's gross negligence. These exceptions would lead to litigation in the compensation scheme, and much more than that which is involved under a simple system, like the workers compensation system.

It may well be desirable to take some areas of product liability claims completely out of the tort system and substitute therefore some other kind of a no-fault compensation system that would assure victims of a complete recovery for economic losses. This could include occupational diseases and perhaps some other areas related to toxic torts. It was the recommendation of the ABA committee, of which I was a member, with respect to former Senate Bill 44, that this matter be given serious consideration with the thought that a no-fault compensation scheme be devised. Such proposals have been made in Congress.

COMMENTS ON SENATOR GORTON'S BILL

This appears to be a thoughtful and reasonable proposal. There are some aspects of this bill that have my enthusiastic support. There are some provisions identical to, or so similar to, provisions of S. 100 that I will not comment upon them.

(1) Uniform statute of limitations. It is proposed under the bill that there should be a uniform statute of limitations with respect to product liability claims filed in state courts. This would be helpful. Existing law on this subject varies widely from state to state and generally a different limitations period is applicable to breach of warranty claims and tort claims. When a person is physically injured as a consequence of a dangerously defective product, there should be a reasonable length of time, after a claimant discovers or should discover the facts indicating that a product hazard was the cause of an injury, within which to bring an action. The time period ought not to be affected by the theory of recovery or the place where the action is brought or the place where the accident occurred.

(2) Non-economic losses. The size of damage awards, especially for pain and suffering, is a cause for some concern. This is so not only for product liability claims but other claims as well, including medical malpractice claims. However, there is a problem about when it is proper and constitutional to single out a particular class of claims for special treatment on this subject. Equal protection concerns are involved. This is not the place to attempt any discussion about when it is permissible to differentiate between classes of claimants and defendants based on special social and economic concerns. It is reasonable to take the position that fault or negligence should be a prerequisite to the recovery of damages for pain and mental suffering or any other non-economic loss, if provision is made for the recovery of attorney fees. Under this bill, a claimant would not be able to recover in any forum, state or federal, for non-economic damages for design defects or for failure to warn except on proof of negligence.

(3) Unlike S. 100, this bill does not attempt to preempt state law, except to a limited extent, or to write a code with much language that will lead to an increase in litigation over the meaning of words. Moreover, unlike Senator Dodd's amendment, there is no attempt to provide a no-fault, non-defective product compensation scheme that would permit recovery in many cases against a manufacturer who produces and sells products that are more beneficial than harmful. It is rather an attempt at changing the law as to damage recovery for design hazards in the absence of fault, and to induce victims to seek recovery for economic losses only, thereby reducing legally recoverable accident costs and also litigation costs.

(4) The coercive provision. The bill provides for both a federal cause of action and a common law cause of action. The federal cause of action would have to be brought in a federal district court and the common law cause of action would have to be brought in a state trial court. The federal cause of action allows for economic losses

only and the state cause of action allows for non-economic losses, but only on proof of negligence with respect to design hazards and inadequate warnings. It is also provided in Section 211 that if the claimant fails in a state court to prove in a design hazard case that the harm was caused by negligence. but does prove that he could have recovered in a federal court on the basis of the federal right, the court can enter judgment for the compensation benefits that he could have obtained in the federal court.

But there is an important qualification. A penalty is imposed on the claimant if the court in a design defect or warning case grants to the defendant a summary judgment, directed verdict, or judgment on the pleadings before the presentation of the defendant's case. The penalty is payment of "defendant's attorney's fees and costs in an amount not to exceed one-half of the claimant's recovery." Probably this was intended to mean when such action was taken and no error was found, if the case is appealed. As Senator Gorton states, this provision is to encourage claimants without colorable claims of negligence to use the federal route. However, it would seem to be clear that the action of the trial judge can sometimes be based on erroneous perceptions of the law in relation to the evidence. It is possible for a trial judge arbitrarily to allow a case to go to the jury and obtain a finding of negligence without any evidence to support the verdict. Possibly, this penalty should apply when the plaintiff finally loses at any stage or at any step in the trial or appellate process because there was no evidence as a matter of law to support the claim.

I must say, however, that this provision gives me some concern. It is always difficult to distinguish between good faith and spurious or bad faith claims. At this time, I express no opinion as to the wisdom of this provision. If the claimant has a colorable claim that would justify a recovery on the federal cause of action based on proof of an unreasonably dangerous product, he would in most cases have a colorable claim on a negligence theory.

(5) Proximate cause and defenses to the federal cause of action for compensation benefits. Under Section 302 of this bill, it is provided that a manufacturer is liable for compensation benefits for harm caused by a product that was sold in a condition that is unreasonably dangerous. Are there to be no defenses? Are the usual "proximate cause" requirements to be ignored? If that is so, then I have reservations about providing for recovery of all economic losses plus attorney fees.

(6) Unreasonably dangerous. It appears that in providing for compensation benefits under the federal cause of action it is provided that a claimant could recover on proof that the product was unreasonably dangerous as designed, without any definition of the meaning of the term "unreasonably dangerous." Is it intended that this be a federal question that is to be left to the federal courts to resolve? I may have overlooked something.

COMMENTS ON SENATOR GORTON'S REVISED PRODUCT LIABILITY BILL (DATED APRIL 26, 1985)

Multistate Actions. My reaction to Section 203 on the subject of removal of state actions is quite favorable. It provides a procedural mechanism for dealing with multiple claims filed in separate states as regards pretrial and discovery proceedings. Proceedings for consolidation and transfer of state product liability actions involving a common question of law to a federal district court could be initiated by a motion filed with a federal judicial panel. If the case is accepted for pretrial purposes, each action consolidated for pretrial purposes would thereafter be remanded at or before the conclusion of such pretrial proceedings for trial on the merits. All of this makes good sense and is a practical way for disposing of multiple claims involving common questions. The pretrial proceedings would be calculated to lead to settlements in many situations.

Jurisdiction and Venue. Under Section 204(a) a state civil action could be brought only in one or the other of four States—that of the defendant's residence, that of the plaintiff's residence, that in which the harm occurred, and that in which the defendant resides (if the defendant is doing business there). These appear to be the states that have a legitimate interest in the outcome, and claimant would be prevented from shopping around for filing a case in the state with (1) the most favorable law on the issues involved and (2) jurisdiction (in the sense of power) to deal with the case. This provision combined with Section 206 on choice of law eliminates litigation about rather complicated choice of law questions related to which state has the greater interest in the claim and what the law of a state other than the forum state is. I presume that the forum state's own statutes would control as regards venue within the state.

Joint and Several Liability. Section 209 is a reasonable proposal for dealing with issues related to joint and several liability, contribution, and indemnity, but my suggestion is that these matters should be left to each state to resolve. There is no feasible way to deal with these problems except in the context of claims against those who are not product sellers. As my comments on S. 100 (page 9) indicate, there is no feasible way to deal with product liability claims as regards these matters without becoming involved with the law related to nonproduct liability claims. Both are often involved, and a seller-defendant (or defendants) is joined with other nonseller-defendants. It is my thought that these complex and difficult issues should be left with the state courts to resolve. State courts and state legislatures have been concerned about the numerous issues related to the proper allocation of costs of accidents between a negligent victim and tortious actions for the last 20 years. The proposed state comparative fault act, set forth in the Appendix on page 1148 of Prosser and Keeton on Torts (5th Ed., 1984), represents, in my prejudiced view, one of the best proposals. In any event, a proper solution involves much of tort law other than that related to product claims.

The CHAIRMAN. Thank you, sir.

Mr. Priest.

Mr. PRIEST. Thank you. I am a critic of modern products liability law. I believe modern products liability law is in need of reform because I think that in its current context, it harms both consumers and manufacturers.

Rather than address the specifics of the amendments, let me present a way of thinking about them that is related to the reform of the law.

Any legal rule, and in particular a rule in the products liability context, can have only two effects. First, it establishes incentives to make a product safely. Second, the rule can provide for insurance for losses that result. A legal rule or statute can influence incentives only up to a certain point. At some point it will be cheaper for the society to suffer the injuries and pay the damage judgment than to further enhance the safety characteristics of the product.

After that point, the only remaining effect of a rule or a statute is to provide insurance.

Now, the two effects of a legal rule on incentives and on insurance are hardly novelties. Courts have been aware of these two functions and they have attempted to achieve both of them through modern products liability rules.

In my view, however, courts have not appreciated that these two goals can only be achieved sensibly if different methods are used.

The central problem confronting products liability law today is the confusion between the incentive and the insurance objectives of the law. It has been widely believed that by expanding liability and awarding more judgments to injured victims, the society would gain in terms of both incentives and insurance.

In fact, there is a question as to whether there has been an improvement in the incentives faced by the parties and a substantial question, although to my mind a certainty, that our modern products liability regime has harmed consumers in terms of insurance.

Why is this so? The method to achieve optimal incentives for the production and use of a product is first to establish standards requiring both manufacturers and consumers to take appropriate precautions to prevent injuries, and to provide that where one of the parties has failed to comply with those standards, it will pay or suffer the full loss from the injury; that is, both economic and noneconomic losses.

Full loss must be awarded in order to establish appropriate incentives.

The method to obtain optimal insurance, however, is different. Optimal insurance does not include the payment of full losses from an injury. If we look at the form of insurance that is currently purchased in the market, which is the best indication of what people want in the form of insurance, at least those people with money to buy it, and what they are willing to pay for, it is obvious that there is no market insurance provided for noneconomic losses.

Even the most wealthy of the population cannot or will not pay the premiums necessary for coverage of noneconomic losses for obvious moral hazard and adverse selection reasons.

As a consequence, to the extent that courts, through modern products liability law, have attempted to provide optimal insurance for consumers by awarding full common law damages in products liability cases, they have failed to achieve the insurance objective.

Let me put the point more strongly. In my view, the insurance provided by modern products liability law has harmed consumers and has harmed the poor and low income consumers of the population most of all. An insurance premium, such as a products liability insurance premium, must be set equal to the average expected loss of the members of the consumer pool.

Since the major element of expected loss is lost income, the average expected loss will be above the income of the lower income members of the pool and below the income of the higher income members of the consuming pool. As a consequence, through manufacturer-provided insurance the lower income members of the pool subsidize the higher income members of the pool.

Manufacturer-provided insurance incorporates in its current form substantial cross-subsidization. Manufacturer-provided insurance has a substantially regressive effect on the distribution of wealth in the society and as a consequence, the high income consumers of the population may actually have benefited from products liability law or, at the minimum, have been harmed the least.

Those consumers that this society believes most worthy of concern, the poor and low income, have been harmed the most by modern products liability law, and this harm again has resulted from the judicial confusion between the insurance and incentive objectives of products liability law.

The substantial attraction of the amendments now before this committee is that they begin to segregate the insurance and incentive objectives of tort law. Both amendments, as you well know, incorporate separate titles providing two separate means of obtaining redress, one through the tort law, and the second through a form of compensation plan.

In current form, the amendments frankly, I think, achieve this segregation between incentive and insurance objectives only crudely. But let me emphasize, these amendments make sense and they may achieve a substantial reform of products liability law if the tort law titles, title III of Dodd and title II of Gorton, were designed to set optimal incentives for manufacture and consumer production and use of products, and if the compensation titles, title II of Dodd and title III of Gorton, were designed to provide optimal levels of insurance for consumers.

Conceived in this way, I think these bills have substantial promise. I must say, however, that the particulars of each of the amendments in their current form need substantial work before anyone can be convinced that the society will benefit by adoption of either amendment.

Let me address one specific issue that is related to the comments that Professor O'Connell made. The Dodd amendment differs from the Gorton amendment by the inclusion of defenses against recovery under the compensation plan.

Now, initially one might think—and this was Professor O'Connell's argument—that it is inappropriate to include defenses in a compensation plan since most first party insurance does not include defenses.

On the other hand, there are two substantial differences between manufacturer-provided insurance and typical first party insurance. First, there can be no experience rating in manufacturer-provided insurance, as there commonly is or commonly can be under first party insurance. Second, under the current plans there are no limitations on recovery such as deductibles, coinsurance, or specifically limitations on the amount of coverage provided that is typically found in first party market insurance.

In my view, the compensation plans of both bills would be improved if there were total limits on coverage provided, adjusted to compensate fully that portion of the population most in need of support.

But in conclusion, the point I wanted to make is a very simple one. The extent these amendments can be refined to further more adequately segregate the incentive and insurance objectives of tort law, they may provide a substantial reform to modern products liability law as we know it.

[The statement follows:]

STATEMENT OF GEORGE L. PRIEST, PROFESSOR OF LAW, DIRECTOR, PROGRAM IN CIVIL LIABILITY, YALE LAW SCHOOL

My name is George L. Priest. I am a Professor of Law at the Yale Law School, and Director of the Program in Civil Liability at the Yale Law School. The views I am presenting today are solely my own. I represent no one and I have no idea whether my views are supported by any party interested in this legislation. I have been engaged in the teaching and study of products liability law for 13 years and I have been at work over the last few years writing a book on the subject, I am not here to declare support for one Amendment or another. Rather, I will attempt to inform you what I think the problems of modern products liability law are, and I will discuss briefly how these Amendments address the problems.

I am a critic of modern products liability law. I believe modern products liability law is in need of reform, but let me make very clear what the basis is for my belief.

Much of the objection to modern products liability law stems from the concern that the current level of payments is excessive. In my view, the claim of excessive payments alone provides no basis to change the law. If we can identify good reasons that defendants ought to be paying these substantial amounts, then they ought to continue paying them. If we can identify social benefits from substantial defendant payments, then these payments should continue.

What are the grounds justifying these payments? The liability of manufacturers has been increased and increased dramatically since the 1960s, first, to encourage manufacturers to reduce the rate of product-related injuries and, second, to provide insurance for product-related losses that cannot be prevented. In the 1940s and 1950s a theory was developed that a standard of strict liability would achieve these ends, and this theory provided the basis for judicial adoption of the strict liability policy in the 1960s and since.

The more careful study of products liability law over the past two decades, however, shows that this theory, while admittedly the best that could be developed in the 1950s and 1960s, is inadequate today. Indeed, the effects of strict liability are unfortunate for consumers and manufacturers both. In my view, modern products liability law harms both consumers and manufacturers.

Any legal rule, and in particular a rule in the products liability context, can have only two effects: First, the rule establishes incentives to make or use a product safely. Second, the rule can provide insurance for losses that result. A legal rule or statute can influence incentives only up to a certain point. At some point, it will be cheaper for the society to suffer the injuries and pay the damage judgment than to further enhance the safety characteristics of the product. After that point, the only remaining effect of a rule or statute is to provide insurance.

The two effects of a legal rule on incentives and on insurance are hardly novelties. Courts have been aware of these two functions, and have attempted to achieve both of them through modern products liability rules. Courts have not appreciated, however, that these two goals can be achieved sensibly only if different methods are used.

The central problem confronting products liability law today is the confusion between the incentive and insurance objectives of the law. It has been widely believed that by expanding liability and awarding more judgments to injured victims, the society would gain in terms of both incentives and insurance. In fact, there is a question as to whether there has been an improvement in the incentives faced by the parties and a substantial question, although to my mind a certainty, that our modern products liability regime has harmed consumers in terms of insurance.

Why is this so? The method to obtain optimal incentives for the production and use of a product is first to establish standards requiring both manufacturers and consumers to take appropriate precautions to prevent injuries, and to provide where one of the parties has failed to comply with those standards that it will pay or suffer the full loss from the injury, that is both economic and non-economic loss. Full loss must be awarded to establish appropriate safety incentives.

The method to obtain optimal insurance, however, is different. Optimal insurance does not include the payment of full losses from an injury. If one looks at the form of insurance that is currently purchased in the market, which is the best indication of what people want—at least those people with money to buy it—and what they are willing to pay for, one notices that there is no market insurance provided for non-economic losses. Even the most wealthy of the population cannot or will not pay the premiums necessary for coverage of a non-economic losses, for obvious moral hazard and adverse selection reasons. As a consequence, to the extent that courts through modern products liability law have attempted to provide optimal insurance for consumers by awarding full common law damages in products liability cases, they have failed to achieve that insurance objective.

Indeed, let me put the point more strongly. In my view, the insurance provided by modern products liability law has harmed consumers, and has harmed the poor and low-income consumers of the population most of all. An insurance premium, such as a product liability insurance premium, must be set equally to the average expected loss to the members of the consumer pool. Since the major component of expected loss is lost income, the expected average loss will be above the income of the lower-income members of the consuming pool and below the income of the higher-income members of the consuming pool. As a consequence, through manufacturer-provided insurance, the lower-income members of the pool subsidize the higher-income members of the pool. Manufacturer-provided insurance incorporates substantial cross subsidization. Manufacturer-provided insurance has a substantially regressive effect on the distribution of wealth in the society. As a consequence, the high-income consumers of the population may have benefitted from products liability law, or at the minimum, have been harmed the least. Those consumers that this society believes most worthy of concern—the poor and low-income—have been harmed the most by modern products liability law. This harm has resulted from the judicial confusion between the insurance and incentive effects of products liability law.

The substantial attraction of the Amendments now before this Committee is that they begin to segregate the insurance and incentive objectives of tort law. Both Amendments incorporate separate titles providing two separate means of obtaining redress: one through tort law: the second through a form of compensation plan. In current form, the Amendments achieve this segregation between the incentive objectives and the insurance objectives only crudely. But, let me emphasize, these Amendments make sense and may achieve a substantial reform of products liability law if the tort law titles, Title III of the Dodd Amendment and Title II of the Gorton Amendment, were designed to set optimal incentives for manufacturer and consumer production and use of products and if the compensation titles, Title II of the Dodd Amendment and Title III of the Gorton Amendment, were designed to provide optimal levels of insurance for consumers. Conceived this way, these Amendments have substantial promise. I must state, however, that the particulars of each of the Amendments need substantial work before anyone can be convinced that this society will benefit by the adoption of either Amendment.

Let me address first the compensation titles of these Amendments. Again, these respective Titles seem to be most comprehensible and defensible if we consider them in terms of the ideal form of insurance for the consuming population. Analyzed in this light, there is an immediate attraction to them. Both of the Titles provide for recovery under the compensation plan of economic losses alone. That is, they deny recovery for non-economic losses. As I indicated earlier, this is a sensible approach to the problem. Not even the wealthiest consumers in the private market for insurance seem able to afford coverage for non-economic losses. One of the great failings of modern products liability law is its provision of this coverage which harms low-income consumers most, but harms high-income consumers as well.

The Dodd Amendment differs from the Gorton Amendment by the inclusion of defenses against recovery under the compensation plan. Initially one might think that it is inappropriate to include defenses in a compensation plan since most first-party insurance does not include defenses. On the other hand, there are two substantial differences between manufacturer-provided insurance and typical first-party insurance. First, there can be no experience rating in manufacturer-provided insurance as there commonly is or commonly can be under first-party insurance. Secondly, under the Amendments as currently drafted there are no limitations on recovery, such as deductibles, co-insurance, or specifically, limitations on the amount of insurance coverage provided, that is typically found in first-party market insurance. In my view, the compensation plans of both Amendments would be improved if there were total limits on coverage provided, adjusted to compensate fully only that portion of the population most in need of support.

There is a second source of concern in the compensation Titles. Both provide for deductions of collateral payments. In my view, the deduction of collateral payments requires substantial further study. Such a provision may distort insurance coverage among different groups of the consuming population. We would expect first-party insurers to respond to the enactment of either Amendment by incorporating provisions in their contracts excluding recovery for product-related losses. Such exclusions would lower first-party insurance rates by shifting recovery to products liability defendants. Such a reaction, of course, would defeat the objective of the Amendments. But it would defeat this objective only in part. Some forms of collateral benefits are unlikely to be amended in this way. It is unlikely that Worker Compensation statutes will be similarly rewritten, that welfare statutes will be redrafted or, perhaps, that government medical and disability policies will be rewritten. If not, however, then the only plaintiffs affected by the reduction of collateral benefits in the Dodd and Gorton Amendments will be workers whose worker compensation payments would be deducted, welfare recipients if welfare benefits are regarded as collateral benefits, and probably government employees if government medical and disability contracts are not amended in the way first-party contracts are. There is no reason to single out these groups within the injured population for the reduction of collateral benefits. Perhaps there are ways of anticipating these problems. But, at the minimum, further study is required.

Let me turn now briefly to the tort law titles of the two Amendments: Title III of Dodd and Title II of Gorton:

The tort law provisions of two Amendments differ substantially. Although neither provision in its current form seems totally appropriate, Title II of Gorton is such an extraordinary jumble that it must be redrafted from the start.

First, Title II of Gorton itself confuses the incentive and insurance effects of tort law by its ratification of current state law as the tort law standard. Current state law has harmed consumers and manufacturers precisely because courts have expanded liability generally in order to achieve greater insurance. Much of modern products liability law reflects an effort to extend insurance by adopting increasingly stringent standards of liability.

The hope promised by the Dodd and Gorton Amendments, in contrast, is to separate the liability (incentive) issues from the insurance issues. Title III of Gorton—the compensation plan—appears drafted in this light, but it is contradicted by Title II of Gorton which ratifies current state law. These two titles, thus, are internally contradictory. There is no conceptual justification for creating a separate compensation plan to achieve insurance and, at the same time, retaining the standards of current state law which themselves have been defined to provide insurance. A separate compensation plan can only be justified if current state law is purged of its insurance features. Title II of Gorton fails this test miserably.

There is a second form of confusion incorporated in Title II of the Gorton Amendment. Again, the principal purpose of (and justification for) a tort law title is to establish appropriate incentives for product manufacture and use. Scholars may debate at the fringes what standard should be defined to achieve this objective but, substance aside, all would agree that whatever the standard, full loss—economic plus non-economic losses—should be awarded whenever the standard is breached. Anything less then recovery of full loss will create inadequate marginal incentives for care.

The Gorton Amendment's Title II, however, confuses the issues of standards and damages. It provides that, for design defect and failure to warn cases, a plaintiff can only recover full loss and punitive damages if negligence is demonstrated. There is a serious conceptual problem to this approach. First, if negligence is believed to be the standard that establishes appropriate incentives for manufacturer and consumer behavior in design and warning cases, why should it not be applied as the exclusive standard of tort recovery? Why allow recovery of full losses without a demonstration of neglience in areas that do not involve design and warning defects? (Parenthetically, imagine the new litigation that would result under this proposal attempting to establish that a claim is not for a design or warning defect.)

Secondly, Gorton Title II creates a peculiar administrative structure for the resolution of claims not involving negligence. Presumably, Gorton Title II allows a plaintiff to seek recovery in design and warning cases under currently prevailing strict liability doctrine, but limits recovery to economic loss. Perhaps this provision reflects an effort of the drafters to ameliorate the vagaries of state design and warning law, but the hope is likely to be illusory. As I understand the Gorton Amendment, a plaintiff unable to show negligence is likely to be much better off avoiding a Title II action in favor of a Title III—compensation plan—action. The actual result may turn on the plaintiff's first-party insurance coverage. Under Title III of Gorton, the claimant need not show negligence—indeed need not even satisfy the defect requirement of most states' strict liability laws—and yet still may recover attorneys' fees. Title II in comparison is much less attractive and is likely to prove a dead letter except in unusual cases involving collateral benefits.

These criticisms should not suggest that I am supporting the Dodd Amendment's tort law provision. Title III of the Dodd Amendment, in its current form, offers us only uncertainty. It is not clear in the slightest what the reasonable prudence standard means, nor how it would be interpreted by the courts. Reasonable prudence sounds like negligence, but my best guess is that it would reproduce the strict liability standard enforced today. The attraction of the Dodd Amendment's language is that it appears to be an effort—essential in my view—to depart from the language courts have used for the past 25 years, in order to lead courts to rethink how to establish appropriate incentives for safe manufacture and use of products. I believe that this objective is totally laudable—indeed is essential—but I am not persuaded that the drafters have yet discovered the appropriate terminology.

Because of the limitation in time, I cannot address the substantial other questions raised by the Amendments, but let me suggest some of them very briefly.

The Amendments in their current form are needlessly complex. There is no reason to burden this legislation with highly disputable and complicated issues such as the Sindell provision, the rehabilitation damages provisions, the contribution and joint and several liability provisions, or the attorneys' fees and offer-of-judgment provisions. Each of these provisions raises substantially complex issues on which there is no consenus within the academic profession or, for that matter, within any of the various interests concerned with these issues.

Allow me, briefly, to give one example: The Sindell provisions in Title II of Dodd and Title III of Gorton seem totally premature. The theory of Sindell is defensible as an abstract proposition, but at the moment it remains an abstract proposition. There has not been sufficient time since Sindell was announced for the courts in any individual state to have worked out the details of the Sindell approach. At this moment, we have no idea exactly how these courts will work out the theory in terms of the products to which it will apply, the methods of measuring market share or otherwise apportioning damages. Most important, there is no reason to believe that the courts in the individual states will fail for some reason to work out this problem with some success. Therefore, I see no plausible justification for the incorporation of a Sindell provision in this legislation. The other provisions listed above are subject to the same complaint.

Obviously these Amendments can generate more than five minutes of criticism. I have tried to outline what I believe the most serious problems of the Amendments are, and also what is most promising about them. Most importantly, to the extent that these Amendments can be refined to more adequately segregate the incentive and insurance objectives of tort law, they may provide a substantial reform of modern products liability law.

Thank you very much.

The CHAIRMAN. Thank you.

Mr. Popper.

Mr. POPPER. Good morning. I am honored to have been invited to participate in the next phase of the debate on product liability today looking at compensation systems.

The compensation proposals presented by Senators Dodd and Gorton represent a creative approach for solving problems of excessive transaction costs, delay, occasionally a 40- to 50-percent contingency fee, dilatory practices of the insurance and defense community, and occasionally the lack of stimulation of safety incentives.

Before going directly to the compensation systems, though, just a word on the residual tort systems. Under the Dodd bill, some of the basic ideas of S. 100 are preserved in a terse residual negligence system. The essential standard of care, the treatment of various procedural issues, and the basic safety incentive signal sent out by that bill is at odds with my perception of tort law.

In contrast the residual system in the Gorton bill essentially adopts State tort law, except it abolishes certain recovery options under 402(a). As such, it deprives plaintiffs who are choosing a litigation option a meaningful recovery predicated on a compensation system, an unbalanced tradeoff, unless the compensation system provides ample and fair recovery.

Accordingly, the focus of my statement is on the compensation systems in these bills. I am troubled by these systems. Professor Calabresi's letter read into the record today indicates that he is in favor of a no-fault system or some variety of it.

Unfortunately neither bill constitutes a no-fault system. Neither bill is a valid parallel to workers' compensation. Both drafts require injured consumers to show substantive or material product defects through the term "unsafe" in the Dodd bill and "unreasonably dangerous" in the Gorton bill and other mechanisms.

When you compound these requirements with the defenses set out in the bills, focused primarily on consumer use of a product, product alteration/risk modification, contributory negligence—perhaps in some context—you are most assuredly going to have litigation and conflict leading to cost and delay. This is particularly problematic when the word "unsafe" in the Dodd proposal is defined in terms of the manufacturer's anticipated use. That has not been the law for some time. At least we could go back to the standard of foreseeability.

To conclude that a danger is unreasonable requires a comparative assessement with dangers that are reasonable, dangers which reasonable people would tolerate, dangers which limited populations would tolerate. It is a complicated process. It is naive to believe that defendants will pay compensation claims, agreeing with claimants that the danger their product creates is in fact an unreasonable danger. That is just not going to happen.

But let's put all that aside and assume that we were looking at a valid compensation system along the lines of the workers' compensation system put forward this morning. Does the 75-year history of workers' compensation justify the use of a compensation model in the product liability field? Has workers' compensation provided safety incentives? Has workers' compensation provided for fair and acceptable compensation?

Has workers' compensation been sufficiently flexible to respond to new technologies and new problems such as toxic tort exposure and occupational disease? If the answer to these questions turns out to be no, then it seems to me that it would be a disastrous mistake to use a compensation scheme in the product liability field. Perhaps more than a mistake, it would probably end up being unconstitutional.

To resolve these questions, I took a look at the literature. I respectfully disagree with my colleague this morning who stated that there is no literature adverse to the compensation model. In fact, I could find little support for the proposition that workers' compensation systems provide for incentives for safety in the workplace.

I found masses of data suggesting that workers compensation allows industry to monitize human pain and suffering and translate that onto easly passed-on insurance premiums. That is not a safety incentive.

A Ford Foundation study on workers' compensation states:

> Workers compensation is a parody of its name. Rather than compensating those maimed on the job, the system shields the industry from financial liability for its workplace practices and promiscuous use of hazardous chemicals, and thereby undermines the country's efforts to improve worker safety and health.

If the premise for workers' compensation on the other hand is uniformity, that too is easily destroyed in the literature. Consider, for example, the research of Theresa Riordan, who in analyzing workers' compensation found the following: If you're going to lose a thumb on the job, she wrote, try and do it in Iowa where it's worth $29,000, rather than across the border in Missouri where it will only fetch $6,800.

The study of workers' compensation is particularly troubling when occupational diseases are analyzed. I could not find a single major law review article or journal commenting that workers' compensation works effectively in the occupational disease area. As to economic analysis, the literature is equally damaging.

In research done by Professors Ashford and Johnson, combining economic and legal analysis, they wrote:

> Perhaps the most remarkable observation which can be made is that despite approximately three-quarters of a century of public controversy and concern, one cannot conclude on the basis of data generally cited to demonstrate the superiority of workers' compensation over negligence, that workers' compensation has effected an improvement in terms of wage loss compensation and deterrence objectives over the evolving negligence system it replaced.

I contend that there is substantial literature that suggests that workers' compensation is a system at risk.

In the June 18 hearing before this committee, Senator Gorton stated: Given the choice of a quick, albeit reduced, recovery or proceeding at the often plodding pace of the existing tort system, most people will choose the compensation system.

I agree. Senator Gorton is absolutely correct. I can state from very personal experience that when a profound injury occurs to a child and medical expenses become insurmountable, then temptations of such a system are overwhelming.

Rightly or wrongly, many people will opt for compensation solely to avoid the traumatic and devastating effects of the trial process which requires an individual to re-live the agonies of an accident, the trauma of intensive care and potentially the death of a loved one.

Because of that temptation, the duty to make a Federal system fair and accessible is a most solemn one. It would be a mistake to read this statement and also my full statement submitted for the record as an endorsement of the existing product liability system. The existing system does not prevent numerous tragedies—did not prevent one in my case.

Accordingly, I do not make my criticisms lightly. If I thought I was looking at a Federal compensation bill which would in fact increase product safety incentive, I would be the first to commend that bill. Unfortunately, I have not seen such a piece of legislation, although I think we are getting very close.

I vigorously endorse continued study of the product liability field in terms of compensation. I applaud the efforts of Senator Gorton and Dodd. I believe a study commission, detached from the political environment, could craft a compensation scheme that might make a substantial dent in the problems in the product liability field. Thank you.

[The statement follows:]

STATEMENT OF ANDREW F. POPPER, PROFESSOR OF LAW, THE AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW

INTRODUCTION AND BACKGROUND

Over the last 6 years the federal government has been involved in an analysis of the product liability system. During that time, the United States Department of Commerce conducted a study of the product liability system, and thereafter the United States Congress considered various legislative proposals designed to modify that system and thereby change the tort field. These efforts have culminated in legislative proposals, S. 44 and S. 100 being the most recent formal efforts, designed to change state tort law by eliminating strict liability in tort in the warning and design defect area, substituting in its place a negligence system. In addition, these bills proposed major changes in the rules of evidence, standards of care, and modes of compensation in the field of personal injury practice.

So far the political process has failed to forge a consensus between consumers, various and disparate industrial interests, retail interests and the insurance community. The task before the Commerce Committee today is different than that faced by the Committee in prior sessions. Today, the Committee is asked to consider whether a compensation system, in the nature of workers' compensation, could be used as a means of improving the tort system. This idea is appealing because, in theory, a compensation system holds out the promise of prompt payment, reduced transaction costs, and basic fairness to all parties. To craft a system that accomplishes those objectives, however, is an extremely difficult task.

In reading through the compensation proposals, there appears to be agreement on the general goals of the tort and product liability law. The tort field must provide sufficient incentives for the development of safe, innovative, and efficient products; it must operate in a manner that is cognizant of competitive realities, both in the establishment of a standard of care and in the perception of consumer expectations; the system must be designed to minimize transaction costs without sacrificing essential process; the system must be fundamentally fair, providing a vehicle for expression by injured persons, an organized process for dicpute resolution, a system that allows for alternative dispute resolution and a system capable of evaluating fault where such evaluations are appropriate. Most importantly, however, the tort system must insure appropriate and complete compensation to persons injured by the commission of a tort.

SUMMARY OF TESTIMONY

At this time, I cannot support any of the proposed federal product liability proposals. While S. 100 has been commendably amended, it nonetheless produces a product liability system which will not create necessary safety incentives and which will unduly burden consumers. The basic standard of care, treatment of numerous procedural issues, and the signal sent out by the bill is at odds with my perception of a workable tort system. In my view, the proposal of Senator Dodd retains as its residual negligence system too many of the problems of S. 100 and for that reason, among others, is unacceptable.

The residual tort system in the Gorton proposal adopts state tort law. However, it abolishes damage options in the 402(a) area without providing a sufficient balancing feature. As such, it deprives plaintiffs choosing to use the tort system of a meaningful recovery.

More importantly, I am troubled by the compensation systems which have been established in these bills. Neither bill constitutes a valid parallel to workers' compensation. Both drafts require an injured consumer to show substantive product defects, through the terms "unsafe" in Dodd and "unreasonably dangerous" in Gorton. According to Senator Gorton's clarification submitted last week, this could include showing the product was defective and unreasonably dangerous.

Worker's compensation is provided to an individual who is injured in the course of employment, so long as the injury arose out of employment and the injury is a "compensable disability."

There is no requirement of showing that the event which caused the injury constituted an unreasonable danger, a difficult proof requirement. Accordingly, there is no parallel, and certainly no quid pro quo for compromising judicial options, as both bills do.

Assuming that the systems were comparable to workers' compensation, there is a tremendous amount of work that must be done before they should be given approval. My analysis of the literature on workers' compensation indicates that the system is highly problematic, devoid of incentives for workplace safety, and, in terms of compensation, inherently unfair. Unless these problems can be worked out in the product liability context, the Senate would be opting for a system that is heavily criticized and plagued with so many difficulties that various pro-labor commentators today call for the abolition of workers' compensation.

Finally, it is my view that there are points of consensus which should be recognized. Between and among responsible lawyers, there is the feeling that excessive fees to plaintiffs' and defendants' lawyers must be controlled. There is the belief that occupational disease and toxic exposure cases, as well as mass tort cases, are not properly handled under the existing tort system. There is recognition of high transaction costs and occasional lack of fairness. There is no convenient vehicle in our existing legal system for recovery of small sums in product cases. A true fault-free compensation system could address some of these problems. I believe that such a system will not be created in a political forum. I strongly urge the creation of a Study Commission to analyze in a detached environment a proper product compensation system.

THE COMPENSATION SCHEMES IN THE GORTON AND DODD BILLS DO NOT PARALLEL THE NO-FAULT PATTERN OF WORKER'S COMPENSATION

Under the Dodd bill, a person may pursue a compensation claim if they can prove that the product "was unsafe and the unsafe aspect of the product was a proximate cause of the claimant's harm . . ." (Section 201(a)). The claimant will be barred if there was an open and obvious danger, if an alteration or modification of the product occurred by the claimant, if there was an assumption of risk, or if the claimant was involved in an "extreme departure from accepted standards of care." Importantly, the term "unsafe" is defined in terms of the "anticipated" use by the manufacturer. These are controversial, onerous, and complex requirements. While Senator Dodd expressed hope that it could be "carried out without attorneys" (Testimony of Senator Dodd, June 18, 1985), this seems most unlikely. The obligations of proving a product is "unsafe", of distinguishing between open and latent hazards, of proving the absence of alteration will require litigation in many cases.

Any lawyer who has practiced in the product liability field recognizes the hurdles established in the aforementioned provisions. First, the term unsafe, when defined in terms of the manufacturer's intention gives rise to a broad range of criticism brought up over the last few years in the Uniform Product Liability Act debate. Suffice it to say that many courts have decided that the manufacturer's intention is the wrong standard for evaluating whether a use by the plaintiff is a proper use. Instead, it is only forseeable use which courts will tolerate as a plaintiff's evaluative standard, if plaintiff's conduct is at all pertinent. Second, the establishment of the "unsafe" criteria as the basis of securing liability is fundamentally at odds with the notion of a compensation scheme. Under workers' compensation, a worker does not have to prove that the event which caused his or her injury was the result of negligence or an unsafe condition. So long as the injury arose out of and in the course of employment, and it is the kind of injury which is characterized as a "compensable disability" the employee, in theory, can collect.

Simply stated, workers' compensation does not require the establishment of lack of safety in the work environment, nor does it allow a worker to be denied liability if the workers' conduct is somehow construed as contributorily negligent. Indeed, the only reason that workers' compensation passes constitutional muster is the absolute lack of an obligation on the part of the injured worker to demonstrate fault. A classic case in this regard is *Hoyle* v. *Isenhour Brick*, 306 N.C. 248, 293 S.E.2d 196 (1982), in which the North Carolina Supreme Court decided that workers' compensation benefits are due and owing an employee who was injured in the course of his employment and who sustained a compensable injury, notwithstanding the fact that the employee had knowingly violated an explicit safety rule. Over half a century ago, the Supreme Court made clear that the "bargain" that is the predicate for accepting workers' compensation, for tolerating the exclusivity imposed on workers, is one which involves the worker being able to collect notwithstanding the presence of fault, unsafe conditions, or any other significant qualifying factor. *(New York Central R.R. Co.* v. *White*, 243 U.S. 188 (1917))

The complexity of proving "unsafe" condition is easily demonstrated in the literature. In cases like *Seely* v. *White Motor*, 45 Cal. Rptr. 17, 403 P.2d 195 (1965), and *Boatland of Houston* v. *Bailey*, 609 S.W.2d 743 (S.Ct. Tex., 1980), plaintiffs are denied recovery notwithstanding the presence of obvious injury because of the difficulties of proving up a lack of a safe condition or "defect." Product liability case law is also rich with instances where the plaintiffs are maimed or killed in accidents but have a difficult time proving that the unsafe condition existed when the product left the control of the manufacturer. The control element in product liability cases, as well as the alteration element (an affirmative defense to a compensation claim under the Dodd bill) are often referred to as timing problems in product liability law. They are difficult litigation issues and require an extensive evidentiary analysis which would be impossible in an expedited administrative process.

In *Scanlon* v. *General Motors*, 65 N.J. 582, 326 A.2d 673 (1974), the plaintiff introduced evidence establishing that his vehicle was defective and caused injury. The court stated that the evidence was sufficient to prove defect, but the plaintiffs lost the case. The plaintiffs failed because they could not establish a sufficient degree of unreasonable danger, but more importantly, because they could not establish the requisite control and timing mandated in product liability cases. These elements are going to be raised every time manufacturers contend product alteration occurred or any time there is an unsafe condition which is not generic or inherent in the product.

If the true purpose of the Dodd bill is to create a compensation scheme, then the bill must be pure no-fault compensation. In his testimony, Senator Dodd stated that his claim system is like a 402(a) system, except that the plaintiffs are only going to recover economic damage. Section 402(a) is not a no-fault system by any measure. Quite the contrary, it is a fault-based system in which certain evidentiary presumptions are grudgingly drawn from evidence that the product is in a defective condition causing a danger that is found to be unreasonable. As such, the Dodd compensation scheme does virtually nothing except deprive plaintiffs of damages to which they are justifiably entitled.

As to the residual tort system available to plaintiffs in the Dodd bill, the provisions are hauntingly similar to S. 100, and I oppose them for the reasons set out in my testimony last year. The language for negligence, "exercise reasonable prudence," is destined to create disincentives for scientific inquiry and to strengthen the custom and usage defense. The preempting provisions (Section 105) are overly broad and inconsistent with public policy in that state law is far preferable to the system suggested by Senator Dodd. Further, the so-called environmental exceptions set out in Section 105 are the narrowest possible exceptions particularly in their use of the Comprehensive Environmental Response Compensation and Liability Act references. The terms "hazardous substance" and "environment" are defined using the

CERCLA definitions. These definitions are shy on toxic substances, pesticides, and numerous other environmental risks.

GORTON BILL

The Gorton bill seems to be a more direct attempt at consensus than the Dodd bill. In the residual negligence system, the bill seeks to preserve state tort law, with the exception of the strict liability provisions involving punitive damages, actual and compensatory damages in design defect and failure to warn cases. It seems wrong to create a state tort system which denies people compensatory damages when they can prove a common law wrong. I do not believe that the trade-off of providing an optional compensation system justifies the damage limitation in this bill. However, short of the damage limitation, at this juncture, I do not have serious criticism of the residual negligence system.

The compensation system established in the Gorton bill is more seriously flawed than the compensation system in the Dodd bill. Like the Dodd bill it does not resemble the trade-off implicit in existing workers' compensation systems. Under the Gorton provision, a claimant would have to show that the product is in a "condition unreasonably dangerous," presumably at the time the injury occurs. Elements of causation are implicit in the bill; further, Senator Gorton has made clear that a claimant must prove the product was unreasonably dangerous or in defective condition or, as stated last week, "something else."

As with the Dodd bill, this proposal involves requirements which are onerous and complex prior to awarding compensation. Administrative entities do not lightly conclude a product is in a condition unreasonably dangerous. To conclude a danger is unreasonable requires a comparative assessment with dangers which are reasonable, dangers which reasonable people would tolerate, dangers which limited populations will tolerate, conditions which are only defective because of the presence or absence of warnings, and numerous other matters. It is naive to believe that defendants will pay compensation claims, agreeing with claimants that the danger their product creates is in fact "unreasonable." This question will be litigated for every product where there is the slightest possibility of an extent danger being characterized as a tolerable risk. Given that spectre, one cannot characterize this as a no-fault system under any definition. Like the Dodd bill, this is a compensation scheme that profoundly limits damages, but then provides those limited damages only after the plaintiffs comply with rigorous proof requirements.

If a trade-off is to be made, reducing available state tort remedies through the judicial system in exchange for an easily-accessed compensation system which provides limited damages, the trade-off must be based on compensation systems radically different from those proposed. Even putting aside the enormous difficulties of compensation schedules, these bills fail on the simple ground of procedural complexity.

All this being said, I am not fundamentally opposed to compensation schemes. Were a compensation scheme put forward which allowed for recovery without any finding of fault, lack of safety, unreasonable danger, or other requirements, and if those schemes in fact allowed for modified compensatory damages, I would give them serious thought. However, such schemes have not yet been put forward. Accordingly, I find no basis for supporting them at this time.

HAD THE COMPENSATION SCHEMES PUT FORWARD BEEN TRUE NO-FAULT COMPENSATION, PARALLELING WORKERS' COMPENSATION, WOULD THEY BE DESERVING OF SUPPORT?

The compensation schemes put forward in the Gorton and Dodd bills are not no-fault compensation schemes. They do not parallel workers' compensation in that they require affirmative evidence of defectiveness and unreasonable danger. Further, both place expectations on consumer performance and both require evidence about utilization of the product, in terms of the manufacturer's expectations. However, given the desire of this Committee to go forward with the review of these systems, I will assume for purposes of argument that these systems are compensation systems which roughly parallel workers' compensation. Operating under that assumption, the following questions are pertinent.

Are we comfortable using workers' compensation as an important corollary in our product liability system?

Does the seventy-five year history of workers' compensation bear out a new and important use of compensation in the product liability world?

Has workers' compensation provided incentives for workplace safety, suggesting that product compensation schemes will provide incentives for safe product manufacture?

Has workers' compensation provided fair and acceptable compensation, or has the system been unduly restrictive and backward in its allocation of benefits?

Has workers' compensation been sufficiently flexible to respond to new technologies and new problems such as toxic exposure and occupational diseases?

Before a workers' compensation model is accepted, in the product liability context, these questions must be answered. If it appears that workers' compensation fails in providing workplace safety and fails in providing fair and reasonable compensation, it would be a disastrous mistake to use a compensation scheme in the product liability field. Perhaps more than a disastrous mistake, it would probably be unconstitutional to deprive huge numbers of the American public from an existing entitlement based on a substitute entitlement which is known to be wholly inadequate.

The following section of this testimony is a review of the literature published on workers' compensation in the last few years. It is by no means an exhaustive review, although an effort was made to survey both legal and labor-industrial journals to gain some insight into the success or shortcomings of the workers' compensation system.

The literature shows that the worker's compensation system is a system in crisis. I could find little support for the proposition that the workers' compensation system provides incentives for workplace safety. I found masses of data suggesting that the workers' compensation system allows industry to monetize human pain and suffering and translate that cost into passed on insurance premiums.

It should be noted that there is no one workers' compensation system. There are numerous systems implemented by the various states, although each system has several identifying characteristics. Most either impose an exclusive remedy of compensation or make for a exclusive option. Most systems are true no-fault systems allowing the claimant to recover without proof of fault or defect on the part of the manufacturer and without reference to the plaintiff's behavior. Most systems operate off a compensation schedule that identifies various potential injuries and then provides a fixed sum to be allocated to the victim of the designated injury. Most of the injury schedules are restrictive and exclude emotional distress, heart disease, and other injuries that are more difficult to diagnose. All systems have causation requirements.

A SURVEY OF WORKERS' COMPENSATION LITERATURE

After evaluating a 1980 study of worker's compensation by the Labor Department, Ford Foundation Fellow Mark Reutter commented that "the 66-year old workmen's compensation program is a parody of its name. Rather than compensating those maimed on the job, the system shields industry from financial lability for its workplace practices and promiscuous use of hazardous chemicals, and thereby undermines the country's efforts to improve worker safety and health." (Reutter, "The Shame of Workmen's Compensation" The Nation, March 15, 1980 at 298) Reutter notes that the workmen's compensation program is constantly plagued by the difficulties of proving causation. In most serious instances, workers' disorders do not arise from an identifiable or discreet event with a "tidy cause; cancer, heart ailments and resiratory conditions not only take years to develop but may be influenced by many factors." (Reutter at 42) Accordingly, the system is perceived as inherently inadequate and difficult to operate because of the causation requirements.

Albert Kutchins comes to a similar conclusion in a law review article noting "that workers' compensation coverage for occupational disease is a 'bad deal' for workers and society as a whole." (Kutchins, "The Most Exclusive Remedy Is No Remedy At All: Worker's Compensation Coverage for Occupational Diseases" 32 Labor L. J. 212, 213 (1981)). Kutchins research includes a comprehensive analysis of the Packer Report, "An Interim Report to Congress on Occupational Diseases" submitted to Congress in June 1980. (Kutchins at 216 and following) According to Kutchins, the Interim Report of the Department of Labor "contains a devastating analysis of the failure of workers' compensation systems to provide adequate relief for workers disabled by industrial "dust", toxic substances, carcinogens, or other unhealthy workplace conditions." (Kutchins at 216) Kutchins discusses at length the problems that workers' compensation has in dealing with toxic exposure, causation, and unpredictable disability patterns. He finds the system ill-equipped to handle occupational diseases, raising the question of how such a system would deal with toxic torts or disorders with extended latency periods in the product liability world.

As to the one apparent benefit of workers' compensation, uniform awards, the Kutchins analysis makes clear that uniformity does not occur within the system. As an example, he compares cases of total disability brought on by disease, contrasted with disability brought on by accident. In his study, accident victims received

$23,400. However, if total disability occurs by disease, the average payment is $9,700. In cases where the workers die, the average survival benefit for accidents is $57,500, whereas the average survival benefit for occupational disease is $3,500. (Kutchins at 221)

If the premise for the use of this system in the product liability world is uniformity, it will not come in the compensation process. There is no such thing as a uniform head injury for a child, back injury for an adult, or symptomotology for toxic exposure. Consider the research of Teresa Riordan, who, in analyzing workmen's compensation evaluated certain select injuries. She found, for example, "if you're going to lose a thumb on the job, . . . try to do it in Iowa, where it's worth $29,940 rather than across the border in Missouri, where it will fetch only $6,821. (Riordan, "Adding Insult to Injury" (March 16, 1984, Washington Monthly 12, 14))

The Kutchins research also touches on the question of incentives for workplace safety. "There is no clear empirical evidence to support the hypothesis that the present pricing system [of workers' compensation] reduces accident frequencies." (Kutchins at 224) Kutchins' concluding characterization of workers' compensation is telling: "[A]s a system designed to prevent occupational disease and take care of its unfortunate victims, workers' compensation is a pathetic failure." (Kutchins at 225)

Kutchins is by no means alone in his conclusions. In the article "The Clash Between Strict Products Liability Doctrine and Workers' Compensation Exclusivity Rule: The Negligent Employer and the Third-Party Manufacturer", 50 Ins. Council J. 35 (1982), Jayne Lynch provides a superb analysis of workers' compensation and its effect on workplace safety. On the question of whether workers' compensation provides incentives, the research by Lynch is explicit: "It is economically more advantageous to incur the safety statute penalty and workers' compensation premium increases than to institute safety devices, programs, or training. The safety of industrial employees is often sacrificed for economic gain." (Lynch at 40) Lynch goes on to note that the force of product liability actions in terms of workplace safety is far more demonstrable than the presence of workers' compensation by any measure. It is her view that the workers' compensation bargain is no longer mutually advantageous and can no longer justify the employers' immunity from suit." (Lynch at 42)

On the question of fair compensation, Lynch finds that most systems compensate an employee "only to the extent which maintains his financial status just above the poverty level." (Lynch at 43) Lynch argues that the bargain which gives rise to employer immunity is no longer valid and that workers' compensation is a vestige of a bygone era. "As long as workers' compensation exists, the employees' rights by definition are abridged. As one commentator has noted: 'If the courts are allowed to give employers immunity to all newly-developed causes of action and rights of employees, the legislative balance will be forever lopsided in favor of employers' " (Lynch at 45 citing Lambry, "Manufacturers' Liability As a Dual Capacity of an Employer", 12 Akron L. Rev. 747, 769 (1969)). Lynch concludes that workers' compensation should be eliminated so that the relationship between the employer and the employee can be restored to an equal footing.

The disparity in awards and the lack of safety incentives seems to be the most common criticism of the compensation system. One view of this comes from Paul G. Engle, who writes the following:

"Theoretically, the money that companies shell out for workers' compensation coverage—like any other insurance premium—should serve as a financial incentive: the safer and healthier the workplace, the smaller the annual premiums. But, in practice, it doesn't quite work that way, observes Mark Patterson, a consultant for the Rand Corporation. . . . 'The empirical evidence doesn't suggest that experience rating is an incentive for saving money,' . . ." (Engle, "A Fraying Blanket of Protection: Will Occupational Disease Claims Undermine Workmen's Comp?", July 23, 1984 Industry Week 41, 43)

Engle goes on to note that the whole workers' compensation system has been developed as a device to monetize accurately minimum costs for injury, thus eliminating the incentives for safety in the workplace. (Engle at 43) Engle's comments are echoed in research on Canadian workers' compensation by Linda McQuaig (95 MacLeans 62, November 8, 1982) who finds that the system has "created a situation in which there is little financial remuneration for the injured worker—and little incentive for employers to do anything about shockingly high death rates in the workplace." (McQuaig at 62)

The fact that workers' compensation provides little incentive for workplace safety and also fails to provide adequate compensation has led some to call for a complete overhaul, by the federal government, of workmen's compensation systems. (See Chelius, "The Influence of Worker's Compensation on Safety Incentives", 35 Industrial and Labor Relations Review 235 (1982)). However, if this system is so decrepit that it requires federal overhaul, one is hard-pressed to see why it has suddenly become the solution for perceived problems in the product liability field.

The study of worker's compensation literature is particularly troubling when occupational disease cases are analyzed. I could not find a single major law review acticle or journal report commeding the workers' compensation system for handling occupational disease or exposure to toxic substances. This being the case, it seems dangerous to try and use this system to handle generic product defects. The two compensation proposals presently before the Committee are designed to handle those situations where there is an injured claimant dealing with a manufacturer who is, in theory, innocent from negligence. This is the situation, in many cases, with occupational diseases in the workmen's compensation field. The response of the workers' compensation field has been to first declare any unusual event to be non-compensable, and then to create a series of obstacles, invariably in the context of causation argument, that makes it next to impossible for workers to recover. In this regard, the research of Kutchins (supra) is overwhelming. His findings in the asbestos area as well as in other occupational disorders make it extremely clear that workers' compensation has been a dismal failure in dealing with occupational disease.

The workers' compensation system is administrative and thus not subject to the openness and inquiry characteristic of our judicial process. The informality of administrative process has many inherent advantages: it usually means a quicker hearing, with less expenses and more full participation by directly and indirectly effected parties. On the other hand, when an administrative system is used as the fundamental vehicle for airing disputes, it often is inadequate. Last year I testified that the product liability litigation system was a necessary way to get full information about defective products. Indeed, in responding to the claim that the system allowed for repetitive litigation, I remarked that such litigation is necessary because your first product liability case is often just the "tip of the iceberg." It is only after numerous hard-hitting trials with high stakes that the full story is revealed. This has proved painfully true in the modern product liability world. The folklore underlying DES, the Dalcon Shield, and asbestos are three obvious examples where public attention was focused only after repetitive litigation. If a compensation scheme is adopted, I have my doubts whether this kind of exposure, and necessary pressure, will be forthcoming.

This month, a four-part series of articles appeared in the New Yorker magazine detailing the history of the asbestos litigation. The research was done by Paul Brodeur, and begins in the June 10, 1985 issue of the New Yorker under the title "Annals of Law, the Asbestos Industry on Trial". Brodeur's research demonstrates that the risks of asbestosis were known to the manufacturers decades before the asbestos litigation commenced in the late sixties and early seventies. It was the workers' compensation system that provided a screen or shield from public exposure for the industry, according to Brodeur.

"Because the lawmakers who drew up the statutes were prevailed upon by industry and its insurers to keep the cash benefits to a minimum, however, workmen's compensation proved to be a boon for employers: they were allowed to compensate for a worker's loss of ife and limb at bargain prices during a time when the injury—and death rate—had soared in coal mines, steel mills, textile factories, and other corners of the nation's workplace." (Brodeur at 63)

Brodeur's article denotes a sorry history in the asbestos filed. He shows how the workers' compensation system was sought out by industry to avoid liability, at a time when the industry subjected workers to known risks, providing workers with no information about that risk.

Ultimately, the pressure of plaintiffs' lawyers, representing the estates of asbestos workers prevailed in making the asbestos crisis a matter of public concern. Brodeur shows that after successful litigation, Johns-Manville and Raybestos-Manhattan sought cover under the federal system, Johns-Manville opting for a bankruptcy. This scenario raises the question of whether a compensation system which has so miserably failed in the workplace area ought to be given such serious consideration in the product liability world.

One possible explanation for the barrage of criticism of worker's compensation is the fact that worker's compensation is not designed to make the worker whole. When compensation is forthcoming, regardless of fault, negligence, or "unreasonability" of risk, the dollar value of the compensation is, by design, approximately two-thirds of economic loss. One reason for this is the notion that employees will be more careful if they must share a percentage of their wage loss when they are injured. Further, courts have made clear that workers' compensation is not a sustenance level compensation, but part of a supplement to the funds made available to an individual for survival purposes. Nonetheless, the simple fact is that compensation benefits are perceived as grossly inadequate while at the same time the compensation system is perceived as heavily biased in favor of the employer. (See 6 Johnson, Cullinan, and Currington, "The Adequacy of Worker's Compensation Benefits, Interdepartmental Task Force on Workmen's Compensation Research and Technical Assistance Reports", June 1979, available from the United States Government Printing Office)

These criticisms raise the question of how workers' compensation compares to the existing tort system. This is addressed directly in the article "Negligence vs. No-Fault Liability: An Analysis of the Worker's Compensation Example", 12 Seton Hall L. Rev. 725 (1982) by Professors Ashford and Johnson. This is one of the best works, combining legal and economic disciplines, analyzing workers' compensation and product liability. After exhaustive economic analysis and evaluation of empirical data, Professors Ashford and Johnson draw several conclusions. "Based on the belief that dollar for dollar, one 'buys' more incremental deterrence from non-victims than from victims, the negligence data appears superior to the worker's compensation alternative." (Ashford and Johnson at 761) The analysis concludes with the following: "Perhaps the most remarkable observation which can be made is that despite appoximately three-quarters of a century of public controversy and concern, one cannot conclude, on the basis of data generally cited to demonstrate the superiority of worker's compensation over negligence, that worker's compensation has effected an improvement in terms of the wage-loss compensation and deterrence objectives over the evolving negligence system it replaced." (Ashford and Johnson at 766) The authors recognize that the negligence and product liability system is plaqued with "uncertainty, expense, delay, and inadequacy of recovery" (Ashford and Johnson at 727), and that these problems give rise to support for compensation models. However, their conclusions are unequivocal. Worker's compensation does not provide incentives for workplace safety and does not provide fair and adequate compensation. Negligence systems, which would of course include strict liability systems, do a better job.

On the question of the level of compensation, workers' compensation is uniformly criticized. The two bills proposed seek to avoid these problems by allowing proof of economic loss in each case. However, that would not address the compensable injury problem. The problems of causation and economic loss are difficult. How would these compensation schemes view a heart attack, assuming the claimant could show that the heart attack occurred while using a product which required considerable exertion? The problem will require extensive litigation and will result in differential state law determinations. In the workers' compensation system, the problem has existed for years with no fair resolution. (See "Heart Injuries Under Worker's Compensation: Medical and Legal Considerations", 14 Sufforlk L. Rev. 1365 (1980)).

In addition to heart disease, the workers' compensation system has stumbled when dealing with most "internal" injuries. Developing a causation analysis, a prerequisite to finding a claim "compensable," has proved to be extremely difficult and has given rise to a great deal of litigation. (See "*Schmidt* v. *Industrial Commission:* Injury Compensability Under Utah's Worker's Compensation Law: A Just Result or Just Another 'Living Corpse'?", 1981 Utah L. Rev. 393) Heart disease, internal injury, and the whole field of emotional and psychological distress appear to baffle those who allocate funds under workers' compensation schemes. Under both the Gorton and Dodd bills, the only compensable recovery, outside of utilization of the residual tort system, is for economic loss. Would that bar most emotional distress claims? If a victim of a product injury suffers emotional distress, but through no fault of his or her own, cannot demonstrate fault on the part of the manufacturer, is their emotional distress, by definition, non-compensable?

It has been a long time recognizing the validity of emotional illness and the need for compensation in that field. Historically, courts were reluctant to provide any recovery for emotional distress, and still balk at lawsuits designed to collect for negligent infliction of emotional distress. It has only been in recent years that some courts have recognized the need to compensate for this very real and devastating phenomenon. Unfortunately, in the workers' compensation field, emotional distress ranks low on the scheme of precictable compensation. In *Seitz* v. *L. and R. Industries,* 437 A.2d 1345 (R.I. 1981), a court decided that emotional distress and psychic disorders which are the direct consequence of workplace trauma are non-compensable. While the court acknowledged the agony to the claimant and the indisputable medical reality of the disease, it found that the workers' compensation system was not capable of sorting out fraudulent claims. The incapacity to sort out fraudulent claims was the rational provided by trial courts in the first half of this century in their uniform rejection of emotional distress claims. In 1982, through the Supreme

Court of Rhode Island, we see a vivid example of how workers' compensation is caught in an earlier time, incapable of recognizing medical reality. (For an excellent note, see "Psychological Injury Resulting From Protracted Stress Is Not Compensable Through Worker's Compensation", 17 Suffolk L. Rev. 493 (1983))

Courts are not uniformly insensitive to the inadequacies of the workers' compensation system. Several courts have attempted to use the dual capacity theory in an effort to break through the problems of workers' compensation, allowing workers to enjoy the dual capacity of both employees and consumers, and employers to have forced upon them the dual capacity of employers and manufacturers. When courts recognize this legal fiction, they allow for the consumer alter-ego to sue the manufacturer alter-ego in product liability actions, contending that this result is fair and not barred by the exclusivity which is the prerequisite of workers' compensation. In California and Oregon, there are good examples of this phenomenon. (*Bell* v. *Industrial Vangas*, 179 Cal. Rptr. 30, 30 Cal. 3d 268 (1981); *Perry* v. *Heavenly Valley*, 209 Cal. Rptr., 771 (Cal. App. 3 Dist. 1985); *McGarrah* v. *State Accident Insurance Fund*, 675 P.2d 159 (Or. 1983)) These cases represent legal fictions made necessary by virtue of the regressive nature of workers' compensation. I should note that while courts recognize the legal fiction, legislatures often take steps to see that courts do not intervene in the process and tamper with the worker's compensation system. (See, for example, Section 3602 of the Labor Code of the State of California, effective January 1, 1983, which declared the dual capacity doctrine unavailable to workers, (California Stats. 1982, Ch. 922, Section 6)

In the final analysis, workers' compensation comes out looking poorly. The benefit levels seem unrealistically low, administrative problems are rampant, definitions of compensable injuries are unclear, and the fundamental objective of fair compensation and increased workplace safety seems to be unmet. I am hopeful that some form of alternative compensation system could be crafted which would ease the burden on the product liability system and perhaps permit certain types of product claims to go forward with prompt administrative resolution. However, when the systems proposed roughly parallel workers' compensation, they must be rejected and reconsidered.

MISCELLANEOUS COMMENTS REGARDING PROPOSED FEDERAL LEGISLATION IN THE PRODUCT LIABILITY FIELD

As I stated in my testimony last year, I do not believe that a national product liability law, implemented by each state (separately) would create uniformity. The notion that occasional federal diversity cases will create such uniformity is wrong and inconsistent with fundamental notions of federalism. State courts are not bound by federal court decisions in diversity cases. It is only the Supreme Court which can bind state court decision-making.

Regarding legal fees, Senators Dodd and Gorton and many others have found the S. 100 formula unlikely to reduce legal fees. I agree. Support for this is found in the Congressional Service Analysis of Legal Fees written by Henry Cohen, made available April 27, 1984. Since the matter has been argued sufficiently I will not comment on it other than to add that some report transaction costs fees involved in workers' compensation are also high and rising every year. (See Riordan, March 1984 Washington Monthly at 12, "Adding Insult to Injury")

I am also opposed to excluding product sellers from the product liability scrutiny, thereby eliminating one of the most forceful and effective incentives for product quality. Product sellers are in direct contact with manufacturers and have tremendous market influence on product quality. Be eliminating product sellers from the product liability field, outside of demonstrable negligence, the Congress would create a disincentive for product sellers to do independent testing of products. They would also create a disincentive for product sellers to engage in full and complete consumer information, for fear that misstatements could give rise to a negligence action. Based on statements made in my S. 44 testimony, it is my thought that product sellers should be part of any product liability system, on an equal footing with manufacturers, although able to receive indemnification in appropriate cases.

Ultimately, if a federal court liability system is adopted, substantial changes must be made to avoid recreating the problems with negligence that gave rise to strict liability in the first place. Record maintenance must be insured so that plaintiffs have some realistic potential of bringing a lawsuit. Doctrines like contributory negligence and other equally invalid antiplaintiff doctrines must be excised.

If a negligence system is adopted, effort must be made to avoid the resurgence of a bottom-line "custom and usage" defense. It should not be the law that a manufacturer is relieved of liability simply because it engages in the same inadequate research and product development as other manufacturers in its field.

If Congress opts for a federally-imposed negligence system, language such as "reasonably anticipated conduct," "unavoidably dangerous", and other heavily criticized portions of prior drafts must be eliminated.

On reflection it seems redundant to continue the attack on tabled legislative proposals. Should it occur that the specific language of the nature described above is once again before this Committee, I would like to have an opportunity to provide my full commentary on that bill.

CONCLUSION

In the June 18 hearing before this Committee Senator Gorton stated: "Given the choice of a quick, albeit reduced, recovery or proceeding at the often plodding pace of the existing tort system for an uncertain recovery and with all the trauma which can be associated with a court battle, most people will choose the former [compensation system] . . . ." Senator Gorton is absolutely correct. I can state from personal experience that when a profound injury occurs to a child, and medical expenses become insurmountable, the temptations of such a system would be overwhelming. Rightly or wrongly, many people will opt for the compensation system solely to avoid the traumatic trial process which requires an individual to re-live the agonies of an accident, the trauma of intensive care and potentially the death of a loved one. Because of that temptation, the duty to make a federal system fair and accessible is a most solemn one.

On January 11, 1982, my son was severely injured when a vending machine fell on him in a supermarket crushing his skull. The injury occurred because of a design defect, but because the product which fell on him was not a consumer product, his case was pursued on a negligence theory. We filed suit, and through discovery learned that the defect which caused the machine to fall had occurred when the manufacturer had control of the product. We were then horrified to learn that this accident was not the first of its kind; other children had been severely injured under the same circumstances. I should note that the machine was designed for use by children. I lived through a life and death crisis and am very familiar with the pressures of a "quick, albeit reduced, recovery." In our case, to choose a compensation award would have relieved the stunning discomfort and pain of trial. However, it would not have provided the longterm financial protection my child deserved and that the trial process provided.

It would be a mistake to read my testimony as an endorsement of the existing product liability system. The existing product liability system did not get that vending machine off the market. It did not provide incentives for product safety at a level that would have prevented this accident.

Accordingly, I do not make my criticisms lightly. If I thought I was looking at a compensation system or a federal product liability bill which would in fact increase product safety incentives and make for a better claims resolution process, I would be the first to commend that system. Unfortunately, I have not yet seen a federal bill which could do a better job than the diverse, eclectic and highly problematic state schemes that now exist.

I vigorously endorse continued study of this field. I applaud Senators Gorton and Dodd for their excellent efforts. I believe a study commission, detached from the political environment, could craft a compensation scheme that might make a substantial dent in the product liability field and allow for a better allocation of resources. Obviously, a scheme modeled on the present workers' compensation system is a tremendous risk, based on the lack of success of that system. Nonetheless, consideration of these systems is a worthwhile effort and adds a new dimension and richness to the ongoing study of product liability law.

There are many things that could change. Contingency fees of forty and fifty percent are outrageous and wrong. Dilatory tactics by the defense and insurance community are inexcusable. Eight year delays to bring a products case to court are outrageous. Equally outrageous is the prospect of uninsured high-risk manufacturers. These problems can be resolved with time, and at this point, detached study. It is my hope that this will occur.

Thank you very much.

The **CHAIRMAN**. Thank you, sir.

Professor Shapo.

Mr. **SHAPO**. Mr. Chairman, I am Marshall S. Shapo, and I am grateful for the opportunity to speak to you.

Instead of rehearsing my prepared statement, I would like to make some general observations about this sort of general legislation at a very abstract level. It concerns me that the legislation does not necessarily seem to solve either the deterrence problem or the compensation problem—in Professor Priest's words read "incentives or insurance."

It seems to me, further, that parts of this legislation ignore the very real benefits that are conferred by the present system, which include, among other things, notions of individualized justice and personal responsibility. The present system relies on certain notions of adversariness, and in that regard, it seems to me that title II of Dodd is particularly troubling because what it appears to do is to deliver claimants into the hands of persons who may become their adversaries later on.

At the same general level, I would suggest that the uniformity which presumably this sort of legislation is aimed at is a ghost, that the certainty which the legislation is designed to achieve is largely spectral. If I had time during the questions, I could give some particular examples.

And I would also like to express the concern that it seems to me that the passage of at least some features of the proposed bills would send a very wrong message to State courts. First of all, it is a congressional second guess, and second, it is a condemnatory second guess. It says, "You have been working at this for 20 years, you have been trying to iron out the kinks, but we think all along that you have been wrong." And in that regard, a further problem with this sort of legislation is that it seems to me to undercut a goal which many of us are now beginning to recognize as a fairly important governmental one in this country, and that is to decentralize decisionmaking and to decentralize the mistakes that often accompany decisionmaking.

Now, I should emphasize, as I say in my prepared statement, that I am not necessarily opposed to discrete solutions to the problem. It seems to me that you might well pick out one or two really serious, manageable problems to which you might devise crisp and manageable solutions, of which the principal one that occurs to me, the simplest one, would be doing something about the time for suits, the statute of limitations problem.

A second one, although I think here you do have to proceed with more care, would be some kind of careful treatment of punitive damages. But to repeat a point that I think I made in my last appearance here, I think that one of the most troublesome things about this sort of legislation is the political horse trading that it imposes upon a rather complex and knotty set of legal rules. I visualize, in markup, trades being made on literally dozens of rules, each one of which would be a proper subject for a full hour, if not more, of careful classroom discussion.

Finally, I would suggest—and here I am italicizing a point that I believe I made in March—that to one who comes from far beyond the beltway, speaking as a private citizen, it seems to me that you do not have to look far beyond today's headlines or any day's headlines to believe that there are many other issues that are much more natural for congressional action.

I oppose this legislation because it is comprehensive Federal legislation: because it is comprehensive, because it is Federal, and because it is legislation.

[The statement follows:]

Statement of Prof. Marshall S. Shapo, Northwestern Minority School of Law

Mr. Chairman, I am Marshall S. Shapo and I am grateful for the opportunity to speak to this Committee. I am the Vose Professor of Law at Northwestern University. One of my scholarly specialities has been the law of products liability, on which I have written several books and articles. Recently, I completed my work as Reporter for the Special Committee on the Tort Liability System of the American Bar Association. The result of that work was a report of almost 1,000 pages, analyzing the workings of tort law in America. I believe your staff has copies of the report.

I speak here as an individual, and not as a representative of the A.B.A. However, the report that I mentioned provides the framework for my remarks today. While that report focuses most closely on the workings of American tort law, it sets forth an analysis of what its title calls a "Jurisprudence of Injury," and describes the many ways in which American society responds to injuries caused by a multitude of risky activities. The report thus places tort law, including the law of products liability, in a larger frame that includes compensation statutes such as workers' compensation and various kinds of regulatory statutes aimed at controlling hazardous processes and products.

The legislation before the subcommittee today seems to me to fit poorly into that developing jurisprudence. Many of my criticisms embrace changes in the law that would be worked by both the Gorton and Dodd bills, and some relate only to one bill or the other.

I briefly summarize objections I have made at previous hearings to three features of these proposals—that they are comprehensive, that they are federal, and that they are legislative.

Once comprehensive legislation is set in concrete, it becomes much more difficult to change one's mind. It is a characteristic of the work of scholars that they do change their minds as they think through problems more deeply. When a single academic does that in print, the merits of his or her arguments commend themselves to courts which react through the incremental process characteristic of the judiciary. It is much harder for Congress to change its mind once it has legislated.

Adoption of legislation like these proposals would replace a hard-won structure of case law that has evolved over twenty years and is, in fact, beginning to cohere. Legislation of this sort would sap the creative powers of state courts, aided in diversity actions by federal courts, that have produced this evolving structure.

The incursions which these bills make into the developing common law, while I understand that the proponents believe they are mild as compared with S. 100, involve closely knotted questions of law that are likely to come back to haunt us.

In opposing comprehensive federal legislation, I am arguing in part against a process of substituting political horse-trading for the discrete, reasoned analysis of particular legal issues, with the opportunity to think things through, that is a hallmark of the judicial process. I must remark, in this connection, on the dizzying twists and turns of the attempts of the last few years to "reform" products liability law. These efforts have included the Model Uniform Product Liability Act, which was designed as model state legislation; the various ancestors of S. 100 and that bill itself; and now the bills that are before this subcommittee.

I can only begin to hint at my objections to these proposals even in their broad outlines. I put some of my objections in the form of questions and others as direct statements:

(1) One may first ask why distinctions should be made among torts with respect to the sorts of damages that we have conventionally come to regard as tort damages. Specifically, why should we distinguish one form of strict liability products tort from another form of strict liability products tort, as well as from negligent conduct? I note in this connection that strict liability for abnormally dangerous activities in a nonproducts context triggers the same kind of damages that negligent conduct calls forth.

(2) The efforts of the proposals to make sharp distinctions between design defects and manufacturing defects appear to me to be doomed to increase the number of unfair distinctions made by the law, or to increase the level of litigation, and quite possibly to have both unhappy results.

(3) The limitation of damages for certain kinds of injuries to economic loss has at least three vices:

a. It does not respond to the widely shared intuition that pain and suffering damages are "rationally convertible into dollars," and that as other authors have put it in another context, "the effect [of catastrophic injuries] on life-style is enormous, and a jury properly assesses the loss as a real injury that can only be compensated monetarily."

b. The limitation of damages to economic loss would appear to achieve insufficient deterrence of risky conduct, because manufacturers dealing with uncertain risks will tend to do less research than is necessary to optimize those risks.

c. The limitation of damages to economic loss appears to discriminate against nonearners. A classic case would be the accident involving disfiguring injuries.

(4) Although I am not an expert in matters of federal jurisdiction, I do want to observe that the elimination of diversity jurisdiction in Section 202 of Gorton would deprive our law of an important enriching element. In my reading of products liability cases over almost twenty years, I can certify that the federal courts sitting in diversity cases have contributed immeasurably to the cross-country judicial conversation that has developed this branch of the law.

(5) The initial process in Title II of the Dodd bill seems to turn adversariness on its head. It arguably undercuts the information-generating benefits of our present law and carries the seeds of gross procedural unfairness to claimants.

I want to make a few other brief observations based on my recent opportunity to view our system of injury jurisprudence taken as a whole:

(6) While I recognize the Committee's concern about statistics on the disparities between losses and recoveries in tort cases, I do not think the Committee should ignore the fact that litigation itself does have positive side benefits: it is a grievance mechanism for resolving disputes that have not yielded to alternative methods of settlement. It develops rules for conduct. And it reveals information that, especially in a world of declining regulation, may not be brought to the surface in any other way.

(7) I should emphasize that what I have said in opposition to comprehensive federal legislation on this subject does not indicate that I necessarily would oppose a rifle shot approach to one or two discrete areas of the law, providing effective surgery against a substantial percentage of the judgments against defendants that many people would view as uneconomic or unjust. So far as I can tell, the leading candidate for this kind of specific legislative treatment would be the statute of limitations. Another such candidate, although here I think that one must proceed with particular care, would be the area of punitive damages. I am thinking here of proposals that have been made to limit the award of punitive damages in "mass tort" situations, and also various formulas that have been proposed to limit the amount of punitive awards to individual claimants.

I also want to pose a few questions that relate tort litigation to the broader framework of injury law:

(8) Why should this particular branch of litigation be singled out for federal legislation? The work of the Civil Litigation Research Project indicates that the tort system does not have a particular tendency to overuse social resources. As one who has faithfully scanned every federal advance sheet every week for more than 15 years, I would suggest that if there is a problem of over-litigation in this country, it is attributable as much to other branches of the law as it is to tort claims.

(9) Why alone among the presently existing tort actions should products liability be made a camel by tying a compensation system hump on its back?

(10) Looking at the question from another perspective, why should a compensation scheme be invented for products claims, thus setting off products injuries from all other kinds of injuries that occur in society?

(11) What I have said clearly implies what my reaction would be to efforts to tack S. 100 onto either of the proposals under consideration today: the effect of that sort of bill would be to create a quadruple-humped camel—one whose ugliness would be a function of its legal messiness and inefficiency.

I close with an example chosen only because it is recent. On the front page of the Post for June 6, there is a news story summarizing an article in a medical journal that hypothesizes "how high-absorbency tampons may have caused toxic shock syndrome." In trying to apply the law represented by these proposals to suits growing out of TSS allegedly attributable to tampons, I identify, even superficially, at least three major sets of issues:

(a) Should one attribute the cause of toxic shock syndrome to a design decision to use certain kinds of fibers or to a manufacturing defect?

(b) Could one easily have separated "fault" and "non-fault" liability in such situations, particularly as the number of cases increased in the months and years after 1980?

(c) Might a housewife who suffered toxic shock attributable to a tampon be limited to her medical expenses, while her twin sister, an attorney, could sue for traditional tort damages? Would we then have virtually identical cases growing out of the same sort of illness, in which siblings were divided into state and federal court tracks, with different attorneys appearing in different courtrooms at different times to litigate on different theories very similar fact questions related to the sale of the same product?

I don't presume to know the answers to these questions. I suggest only that before Congress attempts to put a new grid down on top of an admittedly complex existing body of law, it would do well to consider whether it will be simplifying the law, optimizing the costs of accidents, or generally increasing the quotient of justice. As I said in my last testimony in March, as a citizen it appears to me that Congress has many more important matters on its plate.

Thank you very much, Mr. Chairman.

The CHAIRMAN. We will put you down in the no column.

Gentleman, I really just want to ask one general question which will, I guess, give you as much latitude as you could want in embellishing any views you want to state.

Let me just say this. Professor Shapo has said very clearly and strongly and eloquently that he does not think we should do anything. That is the sort of simple policy decision that we really are equipped to make. We can decide that either we should do something or we should do nothing. The problem is that if you decide the system is in bad shape and something has to be done, and then you begin asking for expert advice as to how to fix it, you ask 100 experts, you get 100 different combinations of answers, each of which is very aggressively stated.

I am just going to give you my assumptions. Eventually, you have to make up your mind on something. I have made up my mind on the following points.

One, I believe, contrary to Professor Shapo, that the present system is bad, it does not work, and that it should be fixed.

Two, I believe that it should be fixed with some kind of combination of a tort system and a compensation system, and I believe that we in the Congress should begin putting together such a combination.

Now, given those positions, if I am your client, given the position that that is where your client is, your client thinks that the system is not right and that it should be fixed, and that it should be fixed with a combination tort system and compensation system, where do we go from here? Either, where do we go from here procedurally, what do we do next, or what sort of program should we move forward with, in your opinion?

And this time I think we will begin with Professor Priest and move to Professor O'Connell.

Mr. PRIEST. Well, it is an interesting question, Senator.

It seems to me, as I understand your views, that your impressions and my judgment of the law are quite similar: That the law is in need of substantial reform, and that it could be substantially reformed by segregating tort law and the incentive objectives of tort law, from the insurance objectives that can be achieved through a compensation system.

I believe in such a reform, and I believe in it strongly. I think that as greater attention is devoted to the products liability problem in the literature during the next 10 to 15 years, more people will come around to that view, and more empirical evidence will be presented to support the view.

The CHAIRMAN. If we wanted to write a bill now, if we wanted to just go back to the drawing boards, we have Senator Dodd's bill and we have Senator Kasten's bill, and we have Senator Gorton's bill. If we just wanted to come up with some legislation which is the best possible combination of the two, given the basic assumptions that we have, what would you suggest?

Mr. PRIEST. Well, I would start with the Dodd bill and work to improve both parts of the Dodd bill. It seems to me the tort law section of the Dodd bill, the reasonable and prudent standard, is hardly well developed. I do not know what reasonable prudence means, and it is not clear to me that it is going to be defined by the various courts in any way different from strict liability as we know it now. That title needs work.

Second, there are a variety of ways in which the compensation system title needs work, but I think it provides a very good starting point, and I think there can be substantial reforms to the law if the Congress starts from the Dodd approach and begins working from the Dodd approach. The Dodd approach is not terribly different from the Gorton approach in terms of structure, although in its particulars I think the Dodd amendment is superior to the Gorton amendment.

But the point I was trying to make was this: I think if the Congress does not act in pursuing a bill of this nature, eventually the courts will come to recognize the adverse effects of modern law. It seems to me that the evidence is overwhelming that everyone loses from the system that we have now.

The CHAIRMAN. I assume that we are raring to go. The question is, where do we go. In other words, I guess the question is what is the mix between the tort system and the compensation system that we should be working toward?

Mr. PRIEST. Well, I think the mix, the structure established in Dodd, is a very good one from which to start. Again, the mix is that the Congress should want to establish a standard in the tort law section of Dodd that tries to achieve appropriate incentives for manufacturers to produce safe products and that awards full economic and noneconomic losses for violations of those standards.

With respect to the compensation bill, I think title II of Dodd needs substantial work. It needs to be more carefully designed to achieve what we imagine optimal insurance to be. It ought to be looked at solely as an insurance scheme, and we ought to think about what optimal insurance is.

There are a number of ways in which it departs from optimal insurance. I mentioned a couple of them. Again, I think the Gorton title III departs even further, but I would start with Dodd title II and try and define an optimal insurance scheme. I think there would be a substantial improvement to the laws if that could be done.

The CHAIRMAN. Professor Keeton.

Mr. KEETON. Well, I would disagree with George on that. I would start with the Gorton bill, and let me say why I would.

I do not think the costs should be internalized to the manufacturer unless either the manufacturer is negligent or he sells a dangerous, defective product. I think under the Dodd bill, as I read it, and under Jeff O'Connell's proposals, the manufacturer would have responsibility for compensation benefit just because an accident was caused by the product; it is therefore unsafe, and then you would have a few exceptions to that, but I think this internalizes a lot of costs that ought not to be internalized, and it will result in, I think, increased costs over what we now have to the manufacturer in terms of litigation costs plus claims paid out and so forth.

So that I think that the real problem is not with the substantive law of liability. I think the substantive law of liability is reasonably sound because it has been based historically on fairness and justice reasons, and I think we could get the fairness and justice reasons in some detail. If a manufacturer sells a dangerously defective product, the costs of that ought to be internalized because it is in a position to bear these costs, and the consuming public ought to bear these costs other than the few who are victimized.

So the problem is with the damage system, it seems to me, and I think Senator Gorton has put emphasis on that and has not changed in any material way the substantive rule.

The CHAIRMAN. Professor Popper.

Mr. POPPER. I guess I disagree with both Professor Priest and Professor Keeton. I would want to emphasize, in response to your question, the importance of conducting future proceedings in a detached environment. Up to this point, the political process has allowed all those involved to define a multiplicity of issues, some of which were unanticipated 6 years ago. I think the time has come to spend the funds and empower a study commission to proceed for a 12- or 18-month period.

I was involved with the deregulation of the trucking industry. I watched a multibillion dollar industry spend 8 years of congressional time arguing and then a 12 month study commission produce a workable bill that was passed in a matter of months. I think there is a great deal to be said for that.

On the substance of the question, you asked what is bad about the system. I think that it is easy to find things bad about the system. It obviously does not create the kinds of incentives in every case that prevent many accidents. We do not live in a risk-free society. Further the system does have many benefits. Accordingly, I would not be so quick to conclude that delay, excessive litigation costs, our dilatory practices are enough to justify Federal intrusion.

If I had to create a new Federal system, I would certainly take the residual tort system in the Gorton bill, and then I would begin to play around with the compensation system in the Dodd bill. I think that the requirements that the Dodd bill sets out for compensation, were we to get a useful definition of the term "unsafe," might end up being a workable Federal system. In the Gorton bill, the residual negligence system, which is essentially an adoption of State tort law, less a remedy option, might become a palatable option if in fact the corresponding compensation system provided exactly what compensation systems are supposed to provide: Some kind of fair, nonjudgmental recovery for identifiable or compensable injuries.

The CHAIRMAN. Professor Shapo.

Mr. SHAPO. First, I would like to make the point, Senator, that I did not think I had said that I was opposed to any legislation. In fact, I thought I had said specifically that I could very well feature legislation that sliced out one or two particular parts of the problem.

The CHAIRMAN. You did, you certainly did, and I am sorry that I so stated. As I understand it, you are opposed to the kind of comprehensive legislation that we are discussing, but you left open the option of addressing specific matters such as statute of limitations.

Mr. SHAPO. That is correct, and I do want to emphasize that it seems to me that you could do that on a basis that is crisp, manageable and appeals intuitively to the sense of justice of a very wide group of people. It seems to me that if you take, for example, the case of the industrial machine that has been sitting out there for 35 or 40 or now and then even 55 years, and you apply a reasonable statute of limitations to that, then you probably bring a lot of people on board who would be very much opposed to more comprehensive proposals.

I am going to take the rest of your question on the basis that you put it as an "if I had to" question. I want to say first, preliminarily, that it seems to me that we must recognize that there may not be a bright line between what Professor Priest calls insurance and incentives, and what I persist in the old terminology of thinking of as deterrence and compensation. It seems to me that even if you have compensation payments being made by manufacturers, that at some level presumably the payment of that money is going to have some kind of deterrence or incentive effects.

Now, you asked me, "if I had to," what would I pick? I think my answer is that I pick Gorton because it is less mischievous with respect to the law which in fact has been very carefully worked out over a period of 20 years, through what I have described elsewhere as a very interesting and rich cross-country conversation among the judges of the 50 state courts and also the judges of Federal courts sitting in diversity cases.

That leads me to two specific comments on the Gorton bill. One way or another, I think these are both in my prepared statement. First, I think it would be unfortunate to eliminate the diversity jurisdiction. I believe, insofar as I can certify to such an abstract proposition as an academic, that the diversity jurisdiction in products cases has in fact enriched the law considerably, and I would be loath to give away that enriching element.

My second concern—and I guess that this goes to both Gorton and Dodd—is that I find it very difficult to understand why you say that some torts, if we can call them that, are going to be compensated only on an economic loss basis while other torts will be compensated on the basis of traditional tort damages.

I think that if you took a hypothetical case of the sort that we might spin out if we had time, that you might get very easily—in fact, I suspect a lot of cases are going to come out this way—the sort of case where you are uncertain as to whether the problem with a product is a design defect or a manufacturing defect, where you are uncertain whether there was fault or no fault, and where you are uncertain about whether loss is properly called economic loss or not.

And in that regard, I would simply add that it seems to me that one of the most troublesome things about the economic loss limitations is their apparently discriminatory cut against those who are not in the work force.

The CHAIRMAN. Thank you, sir.

Professor O'Connell.

Mr. O'CONNELL. Let me say, Senator, that unlike George, I do take an occasional client, and I am glad to have you. Let me also say without any flattery that I think you are absolutely right, I think the present system is so bad that Federal intervention is called for. I think if we wait for the State legislatures and the State courts, we will wait interminably. I think both Senators Gorton and Dodd are on the right track. I think we should use the tort system as an overall threat to induce people into a compensation mechanism.

My feeling about both those bills, that they are overly complex. I think Andy Popper has it right. I think when you include words like "unsafe" and "unreasonably dangerous" and include plaintiff misconduct, the whole thing will quickly crumble into a simulacrum of the present system, and that is why I suggest to you that you have a simple bill that gives the defendant a strong incentive to come forward and pay on an economic loss basis but do not force him to and then, as you rightly pressed me, whether you give, as Guido Calabresi suggests, the plantiff the right to turn that down but put disincentives on him from turning it down is a relative matter of detail.

But I think the idea of having the dual system that you are approaching is absolutely right. Let's have strong, simple incentives for defendants to come forward to take care of economic loss on an insurance basis, as George Priest suggests, and either impose that choice on plaintiffs because that is the way most injured and ill people are paid, if they are paid from insurance, or give the plaintiff the right to turn it down but put sanctions on him in the form of then facing a tort system as it was framed under the original S. 44 or some other sanction.

The CHAIRMAN. Senator Gorton.

Senator GORTON. Mr. Chairman, you have given us a fascinating panel here. I suppose it is oversimplification, so I have to apologize in advance to Professor Shapo as you did, but at least in dealing with comprehensive legislation, he says to do nothing at all because the present system is a good one. Professor Popper says that it is not a good one, but I do not trust you all to do it, political contacts, you had better let the professors write it best, whatever it is they recommend after a few years. Professor Keeton sort of likes mine. Professor Priest rather likes Senator Dodd's. And Professor O'Connell thinks that the system is so bad that we have only done a slapdash job, and we ought to have really radical surgery, much more so than any of us is willing to do.

I am not sure. I may say in connection with Professor Shapo that amending your own statement a little bit, Mr. Chairman, I suppose we could decide to do nothing simply because the present system is better than anything we could do. You pointed that out and stated that you come to an opposite conclusion, as I have. We could also do nothing even though we dislike the present system because we have a feeling that whatever we would accomplish would be worse.

Let me tell you, Mr. Chairman, that that is the answer I get from many of the people I thought I had been trying to help during the course of this last 6 months who are out in the audience. And so it is a very real threat and something which might cause us to want to follow Professor Shapo's views on this subject.

I guess I suspect—and maybe I can get it by reading your statements with great care—that one of the primary reasons that you differ, and I suppose reflect a broad cross section, each of you representing other academic points of view as well—is that we constantly, we at least will constantly confuse and debate the debate over goals with the debate over means, and I guess I get from some of you as we go through here some difference of opinion in the general philosophy about what the system ought to accomplish and what its goals are.

There have been some at least incipient debates on that subject involving the five of you here, and it confuses us, of course, in connection with how we reach a goal, if we have been able to establish precisely what it is.

I get the distinct impression even with you here, if we were able to agree on precisely what the goals of the system is, that the disagreements even among the five of you and among us over how we reached it, what kind of words or phrases we use, what kind of pitfalls to avoid because they are simply going to create a whole new series of opportunities for litigation, would be somewhat easier.

You all were not here the the last time we discussed this issue. One of the members of this committee asked the staff to write up a simple chart, you know, taking a couple of cases and how those cases would be handled under each of the three systems, all together four, I guess, including the present system, and give it to him so that he could understand this entire matter in 10 or 15 minutes and make a rational decision.

I wish it were that easy. I think that would be a help. Personally I wish it were that easy. My frustration, and I suspect the chairman's, is that we can concentrate on the subject for an hour or two, as we are here today. Then we will spend the next week or 2 weeks on something entirely different, and we have to start all over again from ground zero when we get back to it.

I do think both from speaking to Professor Shapo and Professor Popper I get the mood of the committee and maybe beyond the committee that they do think, one, that there should be legislation, two, that it should be comprehensive and that we are going to have to do it for better or worse, so that the best help we can get from all of you is what we hope is a more objective analysis from some of the people who are more immediately concerned, manufacturers or trial lawyers or like that, as to where we are going.

But if any of you is disposed at all to add to his written testimony, like making as clear as possible a statement of what the goals of the entire system ought to be, I would find it very, very helpful because I suspect I would agree with some of you and disagree with some of you, and then I could go on to attempting to figure out how to draft, how to reach those goals, the means to reach those goals with which I disagree.

Professor Priest, I guess I am frustrated by your testimony, less by the fact that you prefer Dodd's approach to mine, is that I do not get very much from you, I do not have written testimony from you as precisely what means you are going to use to reach whatever goals it is that you are outlining.

So you say in general terms you do not like this, that, or the other thing, but that does not help me very much in drafting legislation or coming to a conclusion on some specifics, maybe one or two questions on specifics.

And you, Professor Popper, obviously you have had a very emotional and heart-rending personal experience with the system, and that can both aid in the sharpness of approach to it and sometimes can put emotions in the way of policies.

But you state in your testimony, part of which I think you read, you stated that a quick recovery of the type contemplated by the compensation schemes in both Dodd and Gorton would not have provided the long term financial protection which your child deserved.

Of course, we were trying to design these proposals to do exactly that, but we are thinking more in the context of an employed person more than we were of a child. Assuming that the definition of wage loss were amended to allow for potential income for minors or for people who are unemployed, what element of appropriate financial protection would not have been available for your child under those specific circumstances under these bills?

Mr. POPPER. Let me restate what I think you said. You said you are contemplating a compensation system where wage loss is no longer the measure of economic loss. Wage loss in the present context, would eliminate recovery for children, retired people and similarly situated groups. And that, of course, is an inequity that one would hope was not intended.

If you modify that language to include wage loss plus medical, ongoing medical expenses, it really depends on the kind of injury with which you deal. In our case, dealing with a severe head injury, the range of costs, in addition to pain and suffering, familial distress of punitive damages, are really beyond articulation.

I think that when you have a profound injury to a child or a back injury of an adult, you are looking at a totally rewritten script for that person. As soon as you try to capture in legislative parlance an equivocal dollar value, you miss out on so many things that are essential to protecting that person's interest over the long run.

I do not know what will happen to my child. I do not know what his brain injury will entail. I do not know when he reaches the ages of 7 or 14 if the critical learning functions that click in at that time will occur. If the level stays constant in his development—that is, it does not increase—I do not have the slightest idea what will happen to him.

In the process of trying to evaluate head injury and back injury cases, the range could be anywhere from, say, $10,000 to $12,000 a year for simple medical maintenance, up to $50,000 to $100,000, a year not even considering direct dollar wage loss.

Senator GORTON. Does that mean that there is no standard liability which will work in a compensation scheme in cases like that?

Mr. POPPER. It means that in cases like that you have to be able to explore fully with a judge or a jury all of the potential remedial options. You cannot put on a compensation schedule with any concise terminology the kind of damage potential you are talking about when a whole life has been changed. It does not work that way. I would think that the only way to fairly proceed is not just to look at compensation, but look at the necessity of airing the grievance, look at the necessity of dealing with the rage, of getting the product off the market, of deterrence, and that is not going to happen through a compensation system.

Compensation systems are inherently administrative. They do not provide the public airing that a trial provides. My guess is that with asbestos, with DES, the Dalkon shield, you would not have the kind of public commentary without the high stakes litigation that occurred in those fields that ultimately gave rise to the publicity and then to the recognition of the distress.

So I would have to say that I am at the moment without a way of easily monetizing or capturing the legislative language for that kind of loss.

Senator GORTON. Mr. Chairman, since my time is up, I know you will let me go on; and you have got two more panels to hear from today.

The CHAIRMAN. Three more?

Senator GORTON. Three more? Wow. Right. So I think will have to let it go now and hope that these witnesses will answer questions in writing. But I must say that if any of you is willing to write us a letter, to write me a letter simply stating what your general philosophy in this area is, what goals the system should establish, I would appreciate it. It would help me greatly, immensely in evaluating your testimony, and for that matter where I want to go myself.

I have, as you all know, somewhat changed my mind during the course of the debate in the last 3 years over this entire subject, and it is certainly possible that I will again, Professor Shapo, that we are probably going to do something. So the question which the chairman asked you is an appropriate one?

Mr. SHAPO. Might I say one thing, Senator? I have just produced a report of almost 1,000 pages for an ABA committee. That report, at a length of almost 200 pages, in I think it's the fourth chapter, tries to answer your question. It isn't as concise as you would like it, but that is because this branch of the law responds to a variety of social needs. But at that length I think that the chapter does, using the terminology of courts in response to concrete cases, produce a clear statement of goals, purposes, rationales, however you wish to phrase it.

Senator GORTON. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Gentlemen, thank you very much. We have obviously a number of members who are absent, and I hope that you would be receptive to receiving written questions if members have written questions for you.

Thank you very much for an excellent panel.

The next panel: Martin Connor, General Electric; Phil Jenkins, Sweepster/Jenkins Equipment Co., member of the board of directors and representative of the Farm Industrial Equipment Institute; Patrick Head, FMC Corp. on behalf of the Business Roundtable Lawyers' Advisory Committee; Joseph R. Creighton, vice president and senior legal adviser, Harris Corp., on behalf of the Coalition for a Uniform Product Liability Law.

Mr. Connor, would you start, please?

STATEMENTS OF MARTIN F. CONNOR, WASHINGTON CORPORATE COUNSEL, GENERAL ELECTRIC CO., ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; PHIL F. JENKINS, SWEEPSTER/JENKINS EQUIPMENT CO., AND MEMBER OF THE BOARD OF DIRECTORS AND REPRESENTATIVE OF THE FARM INDUSTRIAL EQUIPMENT INSTITUTE; PATRICK J. HEAD, VICE PRESIDENT AND GENERAL COUNSEL, FMC CORP., ON BEHALF OF THE BUSINESS ROUNDTABLE LAWYERS' ADVISORY COMMITTEE; AND JOSEPH R. CREIGHTON, VICE PRESIDENT/SENIOR LEGAL ADVISER, HARRIS CORP., ON BEHALF OF THE COALITION FOR A UNIFORM PRODUCT LIABILITY LAW

Mr. CONNOR. Thank you, sir.

My name is Martin Connor. I am Washington counsel for General Electric Co., but I am appearing here today on behalf of the National Association of Manufacturers.

For many years now, NAM has strongly supported enactment of Federal product liability legislation. A great deal is wrong with the product liability system. There is urgent need for uniform, stable product liability law which will provide the predictability needed both for rational product management and for rational insurance rate setting.

There is need to take cost out of the system so that it delivers more benefits to claimants than it does to lawyers. There is need to take delay out of the system so that claimants no longer wait an average of 5 years for recovery. There is need for more equitable distribution of benefits so that filing a product liability action will be less like buying a lottery ticket. NAM has supported the Kasten bill, S. 100, because we believe it is a constructive step toward these very desirable goals. S. 100 is not the radical measure described by its opponents, and it is not the panacea hoped for by some of its supporters. It is a rather modest measure really. It would certainly introduce a much greater degree of uniformity and stability into the law than we have at present and would therefore facilitate rational insurance rate setting and rational product safety planning.

On the other hand, we are not as certain that S. 100 would significantly reduce transaction costs or that it would make many more dollars available for claimants than claimants receive today. For these reasons, Mr. Chairman, although we are still supporting enactment of S. 100, NAM applauds your initiative in examining alternative remedies which might eliminate delay, reduce costs, and allocate benefits more equitably than happens at present.

NAM is very pleased to be participating in the working group you have established among the various interested parties, and we sincerely hope that out of these deliberations, and out of these hearings, some consensus may develop which will be in the interest of business, workers and consumers, which is to say in the overall public interest.

NAM has studied the proposals of Senators Dodd and Gorton very carefully. We have several very preliminary observations about compensation claims systems which we would like to share with the committee this morning.

First of all, a compensation system should be tied to its purpose. The function of a compensation claim system is to compensate, not to punish, not to provide safety incentives. We would agree in this respect with the testimony of Professor Priest this morning.

A compensation system should make the claimant whole by paying his or her losses which have not been reimbursed from other sources. If the claimant wants a larger recovery, there is the tort system. If society wants penalties for manufacturor misconduct or incentives for product safety, there is still the tort system. As we design a compensation system it is important that we understand and not confuse our goals.

Second, a compensation system should be a voluntary alternative to the tort system. A claimant should be permitted to choose between it and the tort system. A claimant who elects to sue in tort instead of using a voluntary procedure should be permitted to recover only when the manufacturer has been demonstrably at fault.

Third, a compensation system should be premised on manufacturer responsibility. The compensible event—that is, the test for determining when an injured person is to be compensated—should be specifically defined in terms which adequately justify imposition of liability on a particular manufacturer. And this we think is the most difficult issue raised in this discussion.

We are not inclined to agree that proximate cause and foreseeability, the tests proposed by Senator Dodd, will suffice. Our minds are not closed, but we tend to agree with Senator Gorton that a manufacturer should only be liable for compensation benefits when a product is defective or perhaps unreasonably dangerous.

Fourth, a compensation system should eliminate delay. A compensation claims system will be of little use if it does not force rapid decisionmaking. It should deliver benefits to the claimant in time to pay current bills. This means deadlines for the manufacturer, with incentives to meet those deadlines.

Fifth, a compensation system—and we have not heard anything about this this morning—should focus on the problems of toxic harms. NAM suspects that a serious omission in the proposals of Senator Dodd and Senator Gorton is their failure to address the very difficult problem of proof of causation which arises in product-liability cases involving long latency toxic harm. State worker compensation systems have had great difficulty coming to grips with this issue, and we would recommend that it be addressed head-on in any product-liability compensation claims procedure.

Sixth, a compensation system should provide simplified dispute-resolution processes. NAM would like to see a compensation claims procedure include alternative to litigation, such as mediation or expedited arbitration. There must be more cost-effective ways to resolve disputes fairly than by litigation.

Seventh, a compensation system should not impose new costs. Finally, the result of creating a compensation claim system as a voluntary alternative to the tort system should, if the system is well crafted, be a more equitable distribution of benefits among claimants.

What NAM is advocating is not an increase in the cost of the product liability system but a reallocation to claimants of all the moneys which are now going to support the system itself in this regard. However, NAM's overriding concern is that the cost of any proposal for an alternative system be well understood before its enactment.

Thank you, Mr. Chairman, for the opportunity to appear here this morning. We would be happy to answer any questions or to elaborate on the points we have made here this morning. We look forward to working with you on this important matter.

Senator **KASTEN** [presiding]. We thank you. The next witness on this panel is Mr. Philip Jenkins, the president of Sweepster/Jenkins Equipment Co., and a member of the board of directors, representative of the Farm Industrial Equipment Institute in Chicago.

Mr. Jenkins.

Mr. **JENKINS**. Thank you.

As stated, I am Phil Jenkins, president of Sweepster/Jenkins Corp. We manufacturer streetsweepers and runway sweepers, sweepers of all types. We are a small company of 130 employees. We have a terrible problem, and the reason I am here is my total frustration with this problem. And I agree with Senator Danforth something has to be done. What that something is—I think the court reporter and I discussed it this morning, and she and I are the only nonlawyers in the room. I do not know if we have come to the right forum to get anything done when you come to lawyers. My problems are with lawyers, so it is rather a frustrating and helpless feeling.

We have an employee stock ownership plan [ESOP] program in our company. The employees own as of last year 34 percent, and it will be about 39 or 40 percent this year. My advice to a retiring employee last month who has $360,000 worth of stock is Jim, take your money and get the hell out, because who knows when this thing will go down the tube.

We are saddled with a product that no matter how long we live we are responsible for it. This statute of repose question that keeps being alluded to but passed over, some of my fellow manufacturers disagree with me that 25 years is too long. I say hell, it is better than forever; and I sincerely believe that.

There are things in the Kasten bill that are probably not what I want, but I am willing to take half a loaf. I think that in respect to Senator Gorton and Senator Dodd, I wonder why it took 6 years of hearings to now suddenly go to exploring a compensation system.

In my own company or in larger companies the adage is to get rid of a project you have to shoot the engineer or fire him. It looks to me like this thing has been studied to death. It looks to me like a holding position. I guess I hate to say it. I know I will not make any friends. I know Dale Carnegie and my mother would tell me not to say this. But it would be similar to putting a group of streetsweeper manufacturers together to study the problems of particulate pollution and come up with a solution. Hell, we do not think there is any. And lawyers trying to solve this problem I think are dragging their feet. That is the opinion of a little tiny manufacturer who has had to learn a lot of law he did not want to learn.

I have a case in Massachusetts, a completely different set of rules I have to learn. And Illinois I have another set, and in Michigan I have another set, and then God knows in California, they are out of this country, there is another set. So I am a peddler of streetsweepers, and that is what I want to do, and that is what I am doing to support this 130-employee firm. And becoming a lawyer is not my ambition, and I just—we need simplification. It is a desperation situation, and that is why I am here.

My product liability costs have gone from $4,000 to $400,000 in 10 years. We have not lost any cases. We do not hurt anybody. Hell, my grandchildren use these machines. I do not want to hurt anybody, and this is the frustration that I feel, and I just came to illustrate that frustration or convey that frustration to you and say for god's sakes, go do something, please.

Thank you, gentlemen.

[The statement follows:]

STATEMENT OF PHIL F. JENKINS, ON BEHALF OF SWEEPSTER JENKINS EQUIPMENT CO.

Sweepster Jenkins Equipment Company (Sweepster) is pleased to have the opportunity to present this statement on S. 100, the "Product Liability Act," and on amendments to that bill introduced by Senator Dodd (Amendment No. 16) and Senator Gorton (Amendment No. 100). In order that the members of the Committee may understand the nature of our interest, and the viewpoint from which we consider this bill, permit me to provide a brief background on Sweepster and the professional trade association to which we belong.

Sweepster is a Michigan corporation involved in the manufacture of truck and tractor mounted industrial and runway sweepers, as well as roofing sweepers. The company is today thirty (30) years old, and is 34% owned by employees through an Employee Stock Option Plan (ESOP).

During the last ten (10) years. Sweepster has seen its cost of obtaining adequate liability coverage skyrocket in the commerical market. In fact, premiums increased from just $4,000 per year to over $400,000 during this period of time. As a result of these substantial rate increases, and the further problem of obtaining liabiity coverage anywere at any price. Sweepster had little alternative but to self insure for the first $100,000 of potential loss in 1978.

While I am appearing today as President of Sweepster Jenkins Equipment Company, and am solely stating Sweepster's position with regard to S. 100 and amendments thereto. I would like to point out that Sweepster is a member, and currently serves on the Board of Directors of the Farm and Industrial Equipment Institute (FIEI), which ranks among the oldest manufacturers trade organizations in the nation.

FIEI represents more than 200 manufacturers of farm and specialized industrial and construction equipment. Member firms produce and sell more than 90 percent of the field and farmstead equipment used to mechanize and enhance productivity of farms throughout North America. Through subsidiaries and affiliates, these companies produce much of the farm equipment used throughout the free world.

For industrial markets, FIEI members produce much of the industrial and construction equipment (as differentiated from heavy construction and roadbuilding equipment) sold in North America. Members of this division manufacture most of the specialized items used by the widely diversified construction and maintenance industries.

The subject of product liability has held the active interest of the institute and its members of many years, and we have consequently followed closely the progess of federal involvement in this area since the Economic Policy Board under President Ford appointed an Interagency Task Force on Product Liability.

While this statement does not represent the offiical position of the institute many FIEI members are experiencing product liability related problems similar to those of Sweepster, and share our views on the subject.

Sweepster believes that S. 100, the "Product Liability Act," should be enacted promptly, and have set forth our reasons for that conclusion below. In addition, while we understand the fact that some members of the Committee believe that work on alternative recovery mechanisms such as those advanced by Senator Dodd and Senator Gorton should occur prior to markup of S. 100, we believe that it is important, and even vital, that the members of this Committee clearly understand that action is needed now on this national problem. Manufacturers both large and small are faced with a problem which is today simply out of control. As a result, not only have insurance costs risen dramatically, but many manufacturers have found it impossible to obtain coverage at any price.

We believe that making sense out of America's product liability law must be a priority issue for Congress this year. The immediate need for the enactment of S. 100 is dictated by the need for uniformity in product liability law as well as to reduce the crushing cost which product liability litigation is imposing not just on manufacturers, but on the economy as a whole.

Because no two states treat the issue of product liability identically, it is possible that a manufacturer may be liable for damages in one jurisdiction and not be liable to a second party injured in exactly the same manner across the road. Although most manufacturers are continually striving to improve their products, both in terms of performance, and in terms of safety, it is evidence of that fact that can fix liability in states that consider such enhancements evidence of "subsequent remedial conduct," and therefore allowable in courtroom proceedings.

We are not suggesting that injured parties should not be compensated in cases where negligence clearly exists; but a system that allows recovery for an injury even when reasonable care was taken in the design of the product, where a person was injured due to negligent use of a product or where safety devices originaly installed by the manufacturer were removed, is in our mind, simply impossible to justify. The fact is that the current system is costly, it impedes product safety and primarily benefits lawyers through large fees for litigating confusing and uncertain legal issues at best.

Product liability costs, which are probably incalculable, have already been well documented in previous hearings before the Commerce Committee and there is no need to restate this statistical information here. What is important to realize is that all of these costs eventually find their way into costs of goods and services. Thus it is society, myself and yourself included, which pays this enormous and continually growing cost.

Recently, Senators Dodd and Gorton introduced proposals calling for the establishment by federal legislation of a no-fault compensation system for the benefit of injured persons as an alternative to litigation in cases involving injury by a product. While these proposals perhaps warrant further investigation and analysis, we feel that to delay passage of S. 100 during the interim would simply allow an intolerable situation to reach even greater proportions.

We can reasonably expect the trend of an ever increasing number of product liability suits being filed (the number of which has increased from 4,372 in 1978 to 10,745 in 1984, to continue to escalate. Likewise, the size of court settlements and jury verdicts which have risen dramatically in recent years, and the cost of defending suits, will surely continue to rise as well.

Section 17 of S. 100 provides for a Product Liability Review Panel "to study the need for Federal legislation providing appropriate and predictable benefits, compensation or damages, through efficient and expeditious means, to any claimant who, through no fault of the claimant, is harmed by a product. . . ." In light of this fact, it makes sense that once this uniform products liability law is passed there will be ample opportunity to study experience under those provisions and to give a no-fault compensation system the proper analysis that it deserves.

The Interagency Task Force on Product Liability, referred to above, analyzed the situation where it cannot be proven that the manufacturer should have known of a product's risk at the time it was made or where the manufacturer cannot be identified. The final report of the Task Force concluded that a no-fault scheme does not represent an immediate solution to the product liability problem.

This is the third session of Congress that has considered a uniform product liability law. The provisions of S. 100 have evolved as a result of this continuing debate and four years of committee work. We feel that to become enmeshed in the extensive study which will be required to properly analyze Senators Dodd's and Gorton's amendments will inevitably result in this badly needed legislation again being derailed at a time when the problem has already reached epidemic proportions.

S. 100 represents sound legislation, the passage of which would be a tremendous step forward in finding a solution to a problem that has already forced many manufacturers out of business, and forced others to today be operating without any liability coverage. The product liability problem is a national problem. As such, equitable solutions are rightfully the province of the Federal Government, and we urge you to proceed quickly toward final markup and floor action.

I appreciate this opportunity to comment on S. 100 and its amendments, and would be pleased to be of any further assistance to the Subcommittee.

The CHAIRMAN. I am ready.

Senator KASTEN. Thank you. And there are two nonlawyers in the room. I am a small businessman like yourself. Maybe that is one of the reasons why we are so concerned about this legislation.

The next witness on this panel is Mr. Patrick Head, representing FMC Corp., on behalf of the Business Roundtable Lawyers' Advisory Committee.

Mr. HEAD. Thank you. I was going to point out to Phil that the chairman who replaced Senator Heinz is a nonlawyer, so we can take some heart in that.

I guess I feel a little bit part businessman and part lawyer here since I deal in these type cases every day, and a little bit like the defendants at the bar. We are the ones who pay the bills in these cases, so we are very sensitive to practical aspects.

As you know, Senator Kasten, we came forward a couple of years ago, almost 4 years, as part of the Roundtable and assembled 35 lawyers to work on the Kasten bill. And I had never believed that 35 lawyers could sit around for months and finally agree on a bill, but indeed they did. And we felt that S. 44 and S. 100, however imperfect, did result in addressing some of the things that I was surprised to hear today from Professor Shapo and even from Fritz Hollings, that there are some problems in this system. The fault system is still a workable system. We brought the car that was a bit broken for repairs, and now we find that some of the people are saying you need a new car.

We do not think that is so. We do think the fault system is workable. We think that S. 100 and S. 44 were a measure of correcting some of the national multistate problems in the tort system. I know this may be a plaintive cry at this stage, but we still would like to see the tort system addressed this year. As Phil said, it has been looked at over 5, 6, 8 years. Then address the question of compensation, which is light years away. This is now moving and will move to a question of absolute liability.

And I guess, Senator Danforth, I would, in answering your hypothetical, I would try to correct the tort area that we all seem to agree has a problem, and then take a long and careful look at the compensation system, if it is a viable one. We have fears out there that eventually it will flip over to a system of claims. The thousands of claims that get absorbed every day without a suit, without action will soon flip over into a massive system where H&R Block can fill your claim form out for you, and then we will have to go to the next stage of how do we fund it. We will have a superfund.

So I guess I would like to see us go back to all the work that has been done by Senator Kasten. And you must realize this bill was passed out twice and only by a tie vote did not come out again, and it would address the problems that such diverse people as the professors who appeared before you saw in the system as a system and that we see as the practical payers of the system.

So I would commend to Senator Danforth perhaps to get back to Kasten, and if you need, look at this other area which could be a mushroom cloud in the offing.

Thank you.

[The statement follows:]

STATEMENT OF PATRICK J. HEAD, ON BEHALF OF THE LAWYERS' ADVISORY COMMITTEE OF THE PRODUCT LIABILITY TASK FORCE OF THE BUSINESS ROUNTABLE

I am Patrick J. Head, vice president and general counsel of FMC Corporation. I am appearing on behalf of the Business Rountable in my capacity as chairman of the Lawyers' Advisory Committee of the Business Rountable Task Force on Product Liability.

INTRODUCTION

In 1983, I appeared before this committee to explain the need for Federal product liability legislation and to support Senator Kasten's bill, S. 44. The legislation under consideration at that time was similar to S. 100, most recently considered by this committee on May 16, 1985. I appear here today to remind this committee of the need for a Federal statute that maintains the tort system as this Nation's principal mechanism for the resolution of disputes in product cases and to express our concern that neither the Dodd or Gorton proposals are sound or ready for adoption by this committee.

Although the concepts of guaranteed compensation contained within both Dodd and Gorton proposals have been the subject of discussion before in such diverse areas as motor vehicles and hazardous material, the concepts leave numerous questions to be resolved and are totally inconsistent with our current product liability system.

BACKGROUND

We must not lose sight of the reasons that brought the vast majority of us to consider product liability reform. Products liability law became chaotic as the fault premise of liability was ignored or abandoned by compensation-minded judges. Manufacturers are confronted with a tangled and disintegrating web of rules that lead to inconsistent and unpredictable results.

Two cases illustrate the confusion created by court decisions. In 1978, the Pennsylvania Supreme Court, *Azzarello* v. *Black Brothers Company,* 480 Pa. 547, 391, A.2d 1020 (1978), concluded that a manufacturer is a "guarantor" of the safety of its products, but not an "insurer." The substantive difference between these two, in this context, is incomprehensible.

This year, the supreme court of Michigan, *Prentis* v. *Yale Manufacturing Company,* Docket No. 69581, 11 February 1985, in a rare acknowledgement that the confusion is intolerable, commented that "Courts have accepted the social policy rationale that those injured be defective products should be compensated for their injuries without being subject to the contractual intricacies of the law of sales," while emphasizing, however, "They have never gone so far as to make sellers insurers of their products." As the premise for spelling out a clear negligence standard for design defects and warnings, the Michigan court explained that "Instructing a jury that weighing factors concerning conduct and judgement must yield a conclusion that does not describe conduct is confusing at best." To correct this problem, the court concluded that a determination of "defective" design should be based on negligence. The Dodd and Gorton proposals will not achieve this result.

CURRENT PROPOSALS

The two proposals under consideration approach tort reform from different perspectives. Senator Gorton's proposal leaves most State liability rules intact, expands the jurisdiction of State courts and deprives the Federal courts of diversity jurisdiction in such cases. Features of S. 100 which expand a claimant's rights are included, such as an extended statute of limitations, yet there is no meaningful standard for "defectiveness" in product design and warning cases which is the root cause of inequity in the system today.

Senator Dodd's proposal does not alter the current jurisdiction of State and Federal courts, but, like Gorton's proposal, only a limited preemption of State law is included. Liability is imposed if the product manufacturer failed to exercise reasonable prudence; however, without further definition, this simplified approach is unlikely to eliminate the current ambiguities of State law interpretations.

We sought Federal product liability legislation to resolve a variety of inconsistent rules and interpretations developed throughout the country. The resulting inequities that caused us to seek a legislative solution are too numerous to detail here. However, as a reminder, it may be helpful to restate a few:

(1) Confusing tests to determine whether a design is "defective" lead to different judicial conclusions on the same facts.

(2) In some States, an employer's insurance carrier can recover worker compensation benefits it paid, even though the injury was caused by the active negligence of the employer.

(3) Compliance with Government standards is not a defense even when such compliance is mandatory and the standard is intended to establish an acceptable level of safety.

(4) No limit is established for punitive damage and the standard for assessment is unclear.

(5) Subsequent remedial measures are frequently used to support a claim that a product was "defective" or unsafe. Senator Gorton's proposal attempts to deal with this issue, but Senator Dodd's proposal does not.

(6) Some States have adopted a statute of repose that would end liability for obsolete products, but liability continues forever in many States.

We still believe these issues which caused us to seek a Federal product liability law provide a compelling reason to establish uniform Federal standards. To achieve this result, we supported S. 100 introduced by Senator Kasten. These new bills, in our opinion, fail to resolve the fundamental issues that were addressed by the introduction of S. 2631 in the 97th Congress.

A major argument against a Federal product statute was that it would usurp the State's traditional authority and responsibility for products liability law. In response to this concern, proposals, such as S. 100, were formulated to minimize the intrusion of the Federal Government into areas of legitimate State interest. Yet, the Dodd and Gorton proposals impose a compensation system on all States—a vast departure from common law.

A significant common feature of both proposals is the right of any person injured in a product-related accident to claim compensation from a manufacturer. The claimant is entitled to benefits if the product is "unreasonably dangerous" (Gorton) or if the product is "unsafe" (Dodd). The practical effect of these bills is a guarantee of minimum, but substantial, compensation to any person who makes a claim. The number of claims that would flow from the prospect of easy payment is unknown. No one has analyzed and documented the cost of paying these claims. The problems are specific to the type of product. In many instances, we will not know whether the accident was "caused" by the product. The complexity of the issues depend upon the nature of the accident and the resulting injury—activating a punch press, tripping over a chair, falling off a ladder or a multiple car collision. In addition, both bills maintain an inequitable and costly litigation system which compensates lawyers better than claimants. Neither bill resolves the morass of difficult issues that are part of a no-fault program.

The compensation concept and the issues it presents are sufficiently novel that a thoughtful and comprehensive study is essential before any action is taken. Scholars have different views of compensation systems, and these differences confirm the absence of solutions to questions about increased transaction costs and appropriate incentives for safety. If solutions can be found, we are convinced that they must be coupled with stringent limitations on product liability suits in order to end current abuses. By itself, a promise of compensation will do nothing to minimize the increasing volume of products liability litigation.

CONCLUSION

The Business Roundtable recommends that no compensation proposal be enacted at this time. Although some of our members are willing to discuss the issues, most are strongly opposed to such proposals. A thoughtful and comprehensive study of compensation systems should be completed before any further consideration by this committee.

Senator KASTEN. Mr. Head, thank you.

The next witness on this panel is Mr. Joseph Creighton, who is the senior legal adviser of the Harris Corp. and he is testifying on behalf of the Coalition for Uniform Product Liability Law.

Mr. CREIGHTON. Thank you, Mr. Chairman.

I might say that the coalition represents over 300 manufacturers and about 100 trade associations. We appreciate this opportunity to testify.

Of course, we are disappointed also that the committee did not fully support S. 100. We would like to thank the chairman and others who gave a lot of time and effort on that project.

We understand the strong arguments advanced by the two Senators for a compensation system, and I can assure you that the coalition will work with the committee on looking at those approaches. Nevertheless, I must express grave concerns about some features of these proposals, and also whether a feasible, affordable compensation system can be developed at all, particularly applicable to all products, to all industries and in all situations.

A compensation system in a much more limited context, black lung, has resulted in a much greater cost than was ever contemplated. This is a very complex matter. Although the coalition recognizes that a reasonable compensation system might have a number of advantages, we are greatly concerned about its scope.

I agree with Mr. Head. It would appear to become almost an unlimited system. And terms such as "unsafe," "unreasonably dangerous," and "foreseeability" are matters which are going to produce, we feel, the same problems that the phrase "defective product" has done.

Anyone who has any familiarity with product liability knows that a defective product is not the test the courts are now applying. And I might say on a personal basis that from my own experience our problem is that the law that the professors talk about is not the law that is applied in court, because the facts that the court allegedly works with are not any real facts that any of you would ever recognize if you knew what actually occurs.

And so we have a problem which I am not at all sure the compensation system really solves. This situation varies greatly from industry to industry, and we question whether a single system will fit all situations.

We understand that the Dodd proposal does not contemplate compensating all injured persons such as those injured by misuse of a product such as with a knife or a gun. The list of exclusions is a good starting point, but more are needed. There are problems especially with pharmaceuticals, which have side effects, for example.

Another concern of the coalition relates to the imposition of liability on any manufacturer for injuries caused by another manufacturer of the product. We believe the assumption on which this provision is based, the conception of functional identity and interchangeability, is inherently flawed. Identity of function and interchangeability of products for a particular use does not mean that different manufacturers' products will be identical in terms of quality or safety. Manufacturers who build safer products would be penalized if they were required to pay for injuries caused by low-cost, minimum-grade products of other manufacturers.

A particular flaw relates to imports, and some of you know that this is becoming a serious problem in other ways for the American economy. It is simply unreasonable and unfair under this concept to make domestic U.S. companies pay for injuries caused by importers, but that is what the Dodd approach would seem to do.

There is no sound reason for requiring the American company to be the claims processor for imported products, and then to pay the claim and then to try to collect from foreign manufacturers. I use this example because this is just one of many, many examples of the practical problems that are implicit in these approaches. The concept is clearly a good one, but I think Mr. Head has pointed out it may take a lot of effort to make it work.

We have a variety of other comments about the compensation concept, by the way, which are included in our written statement.

Now, let us look at the tort reform component for a moment. S. 100 is no longer appropriate in its present form because it was adopted as a total change. Now it is a part of a compensation system. The goals are changed. We must meld the tort and compensation system into a meaningful statute.

A statute of repose as required. We have had cases of products over 50 years old, products that have been sold on the used equipment market, products that have been altered by a variety of people. There is a serious problem there.

Punitive damages also is a problem, which has been mentioned by earlier witnesses.

We would like also to mention the application of the present strict liability doctrine to military and space systems produced for the Federal Government. These products are designed for governmental, military, and space objectives where some sacrifices to safety are necessarily made. Strict liability in tort has not been applied very often, but all the experts say the law applies there. We think that needs a serious look.

Finally, we have observed recent reports that insurance capacity is decreasing and that the compensation system may not be insurable at all for several years, or ever. We think a compensation system must be insurable if it is going to work.

I might say in closing that we are happy to work with the committee on all of these ideas, and I thank you.

[The statement follows:]

STATEMENT OF JOSEPH R. CREIGHTON, VICE PRESIDENT-SENIOR LEGAL ADVISER, HARRIS CORP., ON BEHALF OF COALITION FOR UNIFORM PRODUCT LIABILITY LAW

Good morning, Mr. Chairman and members of the subcommittee. I am Joseph R. Creighton, vice president-senior legal advisor to the Harris Corp., I am representing the Coalition for Uniform Product Liability Law. The coalition is a group of approximately 300 manufacturers of all sizes and of all kinds of products, together with over 100 trade associations who have joined together to seek enactment of a fair and uniform product liability bill. On behalf of the coalition, I would like to thank the subcommittee for this opportunity to testify on the proposals of Senators Dodd and Gorton.

THE PRODUCT LIABILITY PROBLEM

The coalition is seeking uniform product liability legislation for several reasons. First, the current patchwork of 50 different State laws on product liability causes confusion and uncertainty. Under existing State product liability law, many fundamental questions, such as when a product is defectively designed and what are adequate warnings, have never been clearly answered. As a result, there are significant differences among the States and sometimes even within a State as to the responsibility of manufacturers to make safe products and the obligation of consumers to exercise care in using products. This situation is intolerable given the interstate nature of our marketplace.

Second, this lack of predictability has had a deleterious effect upon the availability and cost of product liability insurance. Our members report that their insurance companies are forcing them to accept increasingly large deductibles or retentions, while at the same time reducing available policy limits. Some of our smaller members complain that their premiums have increased several hundred percent or their coverage has been cancelled. I might add that these are companies which have never had a claim, much less lost a lawsuit.

Third, State efforts to provide certainty in product liability law have not been successful. While over 30 States have adopted some form of product liability law, those statutes have not addressed the problem either consistently or comprehensively. The experience of the last six years with the States demonstrates that they cannot solve this problem. To be effective, the solution must be comprehensive in each State and consistent among the States. The only way to achieve that degree of uniformity is through Federal legislation.

Last, there are numerous unnecessary costs associated with the current tort law system. By eliminating the uncertainty and confusion in the current system, a product liability bill would also reduce those unnecessary costs.

Our coalition supported S. 100 because it offered a simple and direct solution to the product liability problem, although we preferred earlier versions of the bill which remedied severe problems not addressed in S. 100. By establishing uniform Federal standards, the coalition sought to achieve the predictability and fairness which has been all too lacking in the current system, to the detriment of consumers and industry.

CONSIDERATION OF COMPENSATION PROPOSALS

The coalition is, of course, disappointed that the committee chose not to adopt S. 100. We would like to thank the chairman and others for their efforts to get that legislation adopted. While we would prefer a tort bill to reduce the inequity and uncertainty in the current tort litigation system, we nevertheless understand that the business community will have to consider other approaches to the product liability problem including a compensation system. We will continue to work with the committee on the approach of a compensation system to the product liability problem.

I cannot emphasize enough our grave concerns about whether a feasible, affordable compensation system can be developed or whether such a system can include all products. Efforts to replace the tort litigation system with a compensation system in other, more limited contexts have resulted in virtually open-ended liability for industry. In the Black Lung Program, the one-time cost of that relatively simple exposure to a single product was estimated to be $350 million. The actual cost has been almost $2 billion a year. Predicting accurately the costs of a product liability compensation system with a variety of exposures to a multitude of products may well be impossible. If the number of claimants in a compensation system is substantially greater than the number of claimants in the current tort litigation system, the costs of investigating and processing claims could offset any savings which would otherwise result.

At the same time, the coalition recognizes that a reasonable compensation system might have a number of advantages over the current tort litigation system.

Commendably, the Dodd and Gorton compensation proposals consider payments from collateral sources such as private health insurance. Because such payments are not taken into account by the tort litigation system when calculating a claimant's loss, the injured person may double recover for some expenses. A compensation system could prevent double recoveries by considering payments from collateral sources.

The transaction costs in the current litigation system are very high for industry. The costs of defending against even clearly non-meritorious claims are enormous. If the manufacturer prevails, the victory may be pyrrhic when the legal costs are totaled. A reasonable compensation system might reduce those costs for industry.

High transaction costs in the current tort litigation system also affect consumers. Injured persons must pay a substantial portion of their recovery to the trial bar. A simple compensation system might assure that more of that recovery went to injured consumers and less into the pockets of the trial lawyers.

The variation in recoveries among persons hurt by similar products under similar conditions in the current tort litigation system is unfair to industry and consumers. For industry, the lack of predictability makes product liability insurance either unavailable or available only to a limited extent. For consumers, the current tort litigation system has all the characteristics of a lottery. Some will win verdicts far in excess of their losses; others won't receive enough to cover their medical bills and lost wages. Further, as noted by Senator Dodd, many claimants do not recover in the tort litigation system until years after the injury occurred. A properly fashioned compensation system might provide predictability for industry and fair, speedy recoveries for persons injured by defective products.

CONCERNS REGARDING COMPENSATIONS PROPOSALS

In recent weeks various task forces within our coalition have met to analyze the Dodd and Gorton proposals. While the coalition commends Senators Dodd and Gorton for their efforts, it cannot support either measure in its current form. Both measures contain serious flaws. Enactment of either measure in its present form would impose enormous and unreasonable costs on American business.

I would like to identify for the committee some of our concerns, although I hasten to add that this is not an exhaustive list. The coalition is working to develop such a list for the committee as quickly as possible.

(1) Scope of compensation system: The coalition is greatly concerned about the scope of any compensation system. Numerous classes of persons are injured in product-related incidents, many through no fault of the manufacturer of the product. The coalition fears that the Dodd and particularly the Gorton proposal could result in a system which compensates any product related injury. A compensation system simply cannot afford to compensate all those persons. Further, such a system would eliminate the incentive for product users to act responsibly.

The Dodd proposal considers this fact. For example, it does not intend to compensate persons hurt by products which contain an open and obvious hazard. Such products might include alcohol, tobacco, guns and knives. Thus, in the case of a knife, a person who cuts his finger would not recover. Likewise, in injured person would not be compensated if the injury was caused by conduct which is an extreme departure from accepted standards of care. The list of exclusions in the Dodd proposal represents a good starting point. It should be expanded, however, to address the unique problems of various industries.

For instance, product liability law has traditionally not compensated those injured by an unavoidably unsafe product when adequate warnings are provided. Pharmaceuticals are a classic example of an unavoidably unsafe product. The law recognizes that the therapeutic benefit of pharmaceuticals far outweighs the unavoidable risk posed by a possible side effect for which there was an adequate warning. The committee should not require compensation for hazards posed by unavoidably unsafe products for whch adequate warnings have been provided.

Further, any compensation system must take into account the situation where multiple manufacturers or other parties are responsible for the claimant's injury. In such instances, it would be unfair to permit a claimant to recover from a single manufacturer when responsibility for the injury was shared by others.

(2) Liability for other manufacturers' products: The coalition is also concerned about the provisions in the Dodd and Gorton proposals which seek to compensate claimants when the manufacturer of a product allegedly causing an injury cannot be identified or when the claimant cannot collect from the true manufacturer due to insolvency, lack of jurisdiction, or other reasons. To date, no satisfactory solution to this problem has been proposed by the courts or the commentators. The overwhelming majority of the States continues to require the claimant to identify the manufacturer of the product which caused the injury. A few States have adopted theoretical frameworks to permit claimants to recover in the tort system when the manufacturer cannot be identified. The practicality of those approaches has yet to be demonstrated.

The approach adopted in the Dodd and Gorton proposals of permitting the claimant to recover against any manufacturer in the market at the time the product was sold is fraught with difficulty. In some circumstances, a claimant may be unable to identify the manufacturer of the product which may have caused the injury because the product was purchased in bulk, because it was a category of product which does not carry a label, or because a long period of time has elapsed since the product was used. However, in many instances the claimant, as user of the product, will know who the true manufacturer is or can readily discover that fact. The claimant should not be encouraged to claim against whatever manufacturer appears to be the most available or most likely to pay. The Dodd and Gorton proposals would seem to encourage that result.

The prevalence of imported products raises a special problem in some industries. The coalition finds no justification for requiring a domestic manufacturer to pay a claim for injuries caused by these imported products. In some industries, domestic producers are already fighting for survival and may now have only a small percentage of the market. Nevertheless, because they are likely to be the most available manufacturer to the claimant, it is very likely that they may be subjected to more than their share of the claims, and possibly to most of the claims. The right to seek reimbursement from the foreign producer is likely to prove illusory and the same may be true as to claims against the domestic distributor of the foreign product.

Further, the concept of functional identity and interchangeability is itself flawed. Identity of function and interchangeability of a product for a particular use does not mean that the products of different manufacturers will be identical in quality, with the same safety features, with comparable handbooks or operating instructions, or bear the same safety warnings. Quality and safety are obtained at a cost which must be reflected in the product's price. A manufacturer who cares enough to try to protect its product's users should not be penalized and discouraged from following these practices by any requirement that they pay for injuries to buyers of low cost minimum grade products produced by other manufacturers.

A final problem relates to those products where a period of time has elapsed since their use. This period may be 10, 20, 50 or more years. A manufacturer may not be able to identify reliably the markets in which its product was sold 50 years ago.

What is likely to happen under the Dodd and Gorton proposals in these cases is that the claimant will seek to recover from the largest maker of a similar product still in business. While that manufacturer can theoretically seek recovery from others who sold the product at that time, the reality is that the manufacturer has little hope of indemnification. If a manufacturer cannot tell where its product was being sold 50 years ago, it certainly will not be able to identify other manufacturers distributing at that time. Even if it can identify its competitors of 50 years ago, many of them may no longer exist.

(3) Frivolous claims: Even a compensation system will not be free of transaction costs. A manufacturer presented with a claim will incur certain costs in processing and verifying that claim. Because a compensation system may be viewed as a form of insurance, it might be proper to include provisions found in most types of insurance coverage—deductibles and coinsurance. They might assure that the compensation system is not flooded with minor claims. They might also have the beneficial effect of deterring the submission of fraudulent claims for small amounts which may cost more to disprove than the value of the claims.

(4) Payment schedule: If a compensation system is to be an improvement over the current tort litigation system, and not simply a shifting of claims from one forum to another, then it must be both simpler and more predictable than the current litigation system. This could be achieved by basing compensation on a schedule which takes into account the nature and severity of the claimant's injury. The basis of the schedule would be actual economic loss. But the schedule should recognize the desirability of uniformity in the compensation paid to different individuals with the same injuries. As suggested in the Dodd and Gorton proposals, claims for punitive damages would not be permitted.

Use of such a schedule would also eliminate the complex provisions in section 206 of the Dodd proposal which permit a claimant to reopen a claim at some later point after it has been paid.

(5) Causation: Both the Dodd and Groton proposals recognize the importance of requiring claimants to prove that the product was the proximate cause of their injury before recovering under a compensation system. The coalition commends this approach but it has concerns that the causation requirment may be eroded when applied in a compensation system. For that reason, the coalition urges the committee to clarify what constitutes proximate cause.

The coalition supports the notion in both the Dodd and Groton proposals that manufacturers must be able to contest the payment of a claim if the product was not the proximate cause of the injury. This flexibility is needed to prevent abuse of the compensation system.

(6) Claims based on old products: The coalition believes that a statute of repose is necessary to permit management of claims based on old products. A product manufacturer has little control over the safety or use of a product in most situations after it has been utilized for several years. In addition, many domestic manufacturers have a substantial product base already in place. If they were required to pay compensation based upon those products, domestic manufacturers would be unable to

compete effectively with foreign concerns that are only now beginning to penetrate their markets.

The coalition suggests that a statute which reposes claims 10 to 15 years after the involved product was sold is appropriate and should apply to all products, not just capital goods. The coalition recognizes that special provision must be made for hazards arising from latent defects. The coalition is willing to work with the committee to craft appropriate provisions to deal with such cases.

(7) Foreign manufacturers: The coalition is concerned that all consumers be permitted to avail themselves of any compensation system regardless whether the manufacturer is located in or outside the United States. For that reason, the coalition proposes that all foreign manufacturers which distribute goods in the United States be required to participate in any compensation system. To provide otherwise would significantly disadvantage those consumers who are hurt by foreign-made goods. U.S. manufacturers would also be adversely affected. Our industries would be at a significant cost disadvantage because they would have to prove their products to include the cost of paid claims. Unless foreign manufacturers were also required to build the cost of injuries into their products, their goods would be cheaper.

(8) Recovery for claimant's economic loss: The coalition agrees that any compensation system should provide only for payment of claimants' actual economic loss which necessarily requires that any amount paid to the claimant be reduced by amounts received from other sources. The committee should clarify the application of this principle to the claimant who is the personal representative of a deceased person or guardian of a minor. The claim of such a claimant under the compensation system should be limited to the economic harm to the deceased person, or to the injured minor, as the case may be. If the claimant wishes to assert a larger claim, based on such matters as loss of support or loss of consortium that should not be permitted in the compensation system.

CONCERNS ABOUT THE TORT COMPONENT OF ANY COMPENSATION SYSTEM

For any compensation system to be practical, a suitable tort component must be devloped. S. 100 was designed to provide uniformity in the tort litigation system. The goal in the context of a compensation system is radically different. For that reason, an appropriate tort component must take into account the dynamics between the tort litigation system and a compensation system. Without an appropriate tort component, the lure of the enormous verdict far in excess of an actual loss will continue to draw claimants to the courts and undermine the effectiveness of a compensation system.

The coalition is not suggesting that all claimants be transferred into a compensation system. Although the primary purpose of tort law is to provide compensation, it also includes an element of punishment for outrageous conduct. For that reason, the tort component may wish to distinguish those cases involving egregious conduct where the punishment aspects of the litigation system may still be useful. However, even claimants harmed by egregious conduct should be afforded the option of utilizing the compensation system in lieu of the tort litigation system.

(1) Statute of repose: A statute of repose is needed for those claims which are left in the tort litigation system. Such a statute is necessary to manage adequately those claims which remain in the tort litigation system. Much like a statute of limitations, a statute or repose assures that precious judicial resources are not expended on old or stale claims. The statute or repose should be identical to that incorporated into the compensation system to avoid diverting claimants from the compensation system into the tort litigation system.

(2) Limit on contingent fees: The coalition urges the committee to consider limits on attorneys' contingent fees in the tort component of any compensation system, such as those that have recently been adopted in several States. For example, a trial lawyer's fee would not be statutorily prescribed up to a specified amount, such as $500,000. For amounts above that $500,000, the trial lawyer would be prohibited from taking more than 10 percent of the recovery.

This approach could assure that more of the recovery goes to the claimant while simultaneously amply rewarding the trial attorney for his representation of the claimant. It could also minimize the potential self-interest of the trial attorney to prolong litigation in the hopes of recovering excessive damages of which he will receive a significant percentage.

(3) Punitive damages: Nowhere has the unpredictability of product liability law been more evident than with respect to punitive damages. The legal standards for determining what kinds of conduct should be punished by punitive damages are vague at best. The criteria for determining the appropriate amount of punitive dam-

ages to punish a wrongdoer are virtually non-existent. It is only recently that some courts have begun to require a relationship between the punitive damages award and the amount of compensatory damages.

Perhaps the worst failure of the tort system is its treatment of punitive damages awards in the context of multiple claims. While some courts have expressed concern about this problem, very few have developed means to assure that multiple punitive damage awards do not operate to the detriment both of a company which has already been amply punished and of claimants whose pending claims cannot be satisfied because the company's resources have been exhausted by prior punitive damage awards.

The coalition suggests that the tort component of any compensation system must address the issue of punitive damages. It must divide responsibility for determining whether punitive damages are appropriate and fixing the amount of punitive damages between the jury and judge, respectively. The law must also establish guidelines for the courts in fixing the amounts of punitive damages so that each award bears a reasonable relationship to the amount of the compensatory damages award. Further, the law must establish principles so that the aggregate of the punitive damage awards punishes the wrongdoer for his misconduct—once, and not repeatedly.

(4) Foreign Manufacturers: A particular problem arises with respect to products sold in the United States by foreign manufacturers. Consumers who purchase foreign-made goods should be able to recover from those manufacturers when they sell defective products in this country. The coalition is concerned about the effect of the tort component of a compensation system upon this problem.

(5) Products subject to Federal Contract specifications: The coalition urges the committee to deal with the product liability problem posed by weapons, military supplies, and space equipment made to specifications set by the Federal Government. Manufacturers of these products should not be held responsible for injuries which stem from governmental, military, and space requirements which may sometimes sacrifice safety in order to meet other urgent governmental needs.

(6) Products subject to pre-market approval: The coalition suggests that the tort component of any compensation system establish a rebuttable presumption that a product is safe if it has been thoroughly evaluated and approved for marketing by the Federal Government. This rebuttable presumption could be overcome by evidence of fraud, misrepresentation, and the like.

INSURABILITY OF COMPENSATION SYSTEMS

One final observation about the compensation proposals. In recent weeks there have been several newspaper accounts suggesting that insurance capacity is decreasing. Indeed a Lloyds of London syndicate—traditionally the insurer of last resort—has put out a call to its investors on account of product liability and other losses. As the coalition stated earlier, there are significant affordability and availability problems with respect to product liability insurance. A compensation system may exacerbate those insurance problems. In fact, there are other reports that compensation systems may not be insurable for a period of years, if ever.

For any compensation system to be acceptable, it must be insurable. While some large manufacturers which self-insure might not be adversely affected by the unavailability of compensation insurance, small and medium sized members of our coalition do not have the resources to self-insure for an indeterminate number of years.

The coalition strongly urges the committee to assure that any compensation system proposed is insurable. If insurance will not be commercially available, then the committee should explore means of making self-insurance more practical. One suggestion is to permit a tax deduction for the premiums a manufacturer pays to itself when it self-insures. Similarly, reserves for unpaid losses established for purposes of self-insurance could be made tax deductible.

The coalition also urges the committee to review the Product Liability Risk Retention Act. Passed by this Committee several years ago, that act was intended to permit businesses to establish groups to self-insure. The committee should determine what, if any, changes are needed in it to make it more practical for small and medium sized manufacturers to self-insure with respect to a compensation system.

CONCLUSION

The coalition has worked diligently over the last few weeks to study the Dodd and Gorton proposals. It has established a task force of lawyers, insurance experts, and academics to evaluate these proposals. Based upon our analysis, we have been able to develop some suggestions for the committee. The coalition will continue to work through the summer to analyze these proposals and to refine our comments.

At this point, the coalition is not certain whether a workable compensation system can be developed or if such a system can apply to all products. The coalition is committed, however, to work with the committee and with Senators Dood and Gorton to answer these questions.

Thank you.

Senator KASTEN. Mr. Creighton, thank you. I understand your position and also the position Mr. Head took in referring to work on the two issues separately. That was my first choice also. It is not the will of the committee, and as you know now, we have an informal working group with labor representatives, consumer representatives and manufacturing representatives who are starting to coordinate and to work toward trying to develop a common ground.

Your position, as I understand it, is that you prefer to go forward with S. 100, but I would like to ask you specifically will you and your association work with us in trying to develop this more comprehensive approach, even though it might not be your first choice?

Mr. CREIGHTON. Absolutely.

Senator KASTEN. Mr. Head.

Mr. CREIGHTON. May I please say in a coalition of 300 companies it is very difficult to find out what everyone believes, particularly when they're in different industries, and I think there may be different problems in different industries, but we certainly will.

Senator KASTEN. Mr. Head.

Mr. HEAD. Yes; I believe we're already in the Danforth group, so we are working on it.

But again I would commend you back to the fact that we started on tort reform 4 years ago, and now all of a sudden we are into victims' compensation. Many of us felt that would happen a couple of years ago as the superfund legislation had started to get into this area. This is a very, very large area. I am sure both Senators know because they have been practicing lawyers. But it is a light year step to go from a tort system to an absolute liability system, and we do not know what is out there, and the professors really do not know what is out there either. We see it from a very practical standpoint.

Senator KASTEN. Mr. Jenkins.

Mr. JENKINS. Well, we at FIEI, we in the last 3 or 4 weeks have had an insurance seminar of 100 companies, and I think those companies are in the same desperate state that I am and will go along with working with whoever and whatever we can.

There will be somewhere between 30 and 40 of those companies who will go without insurance in this next year. They are unable to obtain product liability insurance. And that, to those of you who have a great consumer interest, where does the money come from without insurance?

Senator KASTEN. Mr. Connor.

Mr. CONNOR. As I said in my prepared statement, Senator, we certainly will work with the committee in attempting to arrive at a proposal which combines elements of the tort and compensation systems. As a matter of fact, we are right now working with Senator Danforth's working group, and we have worked previously with Senator Gorton and Senator Dodd in the preparation of their amendments. The answer is definitely yes, we will.

Senator **Kasten**. In the testimony last week and in other testimony that has been prepared for today there are still a number of people who contend that the current product liability crisis is due primarily to uncompetitive and also what they would call subjective rate making by the insurance industry; in other words, essentially this is an insurance industry problem as opposed to a problem of tort law, of product liability.

What is, each of you, your response to that argument that this is essentially uncompetitive and subjective rate making by the insurance industry that is the problem, and that the problem is not due to unclear or to inconsistent product liability law?

Why do we not start with Mr. Connor and work across?

Mr. **Connor**. I think the answer is that it is quite the opposite. If I can put on my General Electric hat for a moment rather than NAM, our company is having the experience right now, as many of the companies represented in this room are, I am sure, of being told by the insurance market, particularly the London market to which we go for excess coverage, that the U.S. tort system is uninsurable; that they are coming to the conclusion that the predictability, which has to be the basis of any rational insurance system, simply is not there. And I think we could point specifically to the recent agent orange litigation in which, you will remember, the judge, after bringing the companies together after almost a $200 million settlement, then announced to the world there had been no basis there for liability in the first place. The insurance market looked at this and nodded their heads and said: "That is what we always thought; that is what we always thought the U.S. product liability system was up to."

Senator **Kasten**. Mr. Jenkins.

Mr. **Jenkins**. About 7 years ago we set up an insurance company in the Cayman Islands to buy reinsurance in the offshore market, and we found exactly as the previous speaker is alluding to, that they feel, the reinsurance people from offshore feel that we are nuts. The court system is just too unpredictable, and we are having exactly that same problem. And then to go even further in the problem, a lot of these insurance companies are going broke. We had a layer of insurance go broke in just the last year which covered our 1981 and 1980 coverages.

Senator **Kasten**. Mr. Head.

Mr. **Head**. We're putting the FMC hat on. We are basically a self-insurer, so our discomfiture is really with the tort system rather than the insurance system.

I guess I wanted to ask one question of the Senators; that if you take a long look at this compensation system and decide that it is something that needs a lot more work, is there a chance that you can bring Kasten back up, because that is what all the effort was spent on before, and then perhaps take a look, a long and careful look?

Senator **Kasten**. Let me just respond to that. We are looking in terms of using the base of S. 100 and adding onto it an agreed-to, if possible, agreed-to compensation system. It might not be complete. It might not be exactly what everyone would want. Obviously, it is a question that is going to take years and years of debate and discussion. But the idea is to develop at least a skeleton of the compensation system along with S. 100 and to pass that as a first start. But whether this is possible or not is something that we are in the process of trying to determine right here.

Senator GORTON. The chairman speaks for himself.

Senator KASTEN. Mr. Creighton, what is your response to the argument this is essentially an insurance problem; it is not due to unclear or inconsistent product liability law?

Mr. CREIGHTON. I do not believe you can place the blame on the insurance industry. I believe that the problem stems from what happens in the courts, and that changes from State to State. But a national manufacturer, of course, has to insure against the worst State, and I do not see how you can blame the insurance system for not wanting to insure. In punitive damages insurance is not the answer.

You know, we had a case, for example. We self-insure. We have had a cap. We have only had to go to the cap once. We monitor a program very carefully. We build radio-television transmitters. Would you believe that our insurance company paid $13½ million to settle a case because our transmitter was being lifted to a tower in Houston by a rigger that was hired by the tower people, who dropped it from a 1,000-foot level with five people on board.

Now, why is that product liability for us? If the insurance company looks at that risk, though, after paying $13½ million, it is going to be our insurance rates that go up. And I am not sure that you can blame them for that.

Senator KASTEN. Thank you.

Senator Danforth.

The CHAIRMAN. I want to answer Mr. Head's question, because I think that you have asked a good question, and it deserves a very clear answer.

The question is, what are the chances that if it appears we are not making progress in developing the compensation program, we could attempt to go back to the Kasten bill to see if we could pass that. My own view is that the answer is that the chances are zero.

We have tried that. We had a markup of the Kasten bill. My belief from the outset has been that we should try to have a marriage between Kasten and compensation, but I voted to report out the Kasten bill in and of itself.

I have to assume responsibility for the scheduling of the committee, and it is just not worth the time to continually fight the same battle over and over again. I think we have the opportunity to do something that is really worthwhile, and that is to come up with a combination of tort reform and compensation which would be in the best interests of the consumers and the business community.

And it is only by bringing the consumers and business community together that we are going to get a bill. Heretofore, the consumers and the business community have been at opposite poles, and then there has been a third player and that has been the bar. And my hope is that we could come together and meet the concerns of the business community for certainty and the concerns of consumers for compensation for damages without spending years of time and large percentages of the return on lawyers' fees.

And that is what we are working toward now, and I think without that kind of marriage of the two interests, I do not think we are going to get anywhere.

I want to ask you, if you would, to respond to the kind of suggestion made by Professor O'Connell. I am not going to ask you to sign on to every detail, but the basic concept, the basic concept of Professor O'Connell was that in product liability cases—now, we could change that to some product liability cases or to a specific description of product liability cases, his suggestion was that in all product liability cases the defendant, the business, would have an option. The option would be to just receive the claim and pay out economic damages, period—just economic, no pain and suffering, no punitive damages. Economic damages on the basis, presumably, of some sort of schedule like workmen's comp. Just pay it out and that is the end of it. You would have that option, or you would have the option of saying no, I want to go to the tort system, in which case there would be disincentives to going into the tort system. That is to say that the plaintiff's burden of proof would be lighter than it is today. Maybe his recovery—although this was not Mr. O'Connell's suggestion—maybe his recovery would be somewhat greater than under the compensation plan.

What would you think of such a program, something along that line? Anybody.

Mr. **Head.** I guess the question that the professor got from Senator Fritz Hollings was the key one: the vast amount of claims that are readily absorbed in the system without ever any resort to count may flow right into that system. There are thousands, maybe millions of claims that never get into the system that may well flow into the system through just that mechanism. That is the very great danger that I guess you have to look at, and some of the larger companies could address that better than I.

Mr. **Creighton.** I obviously cannot speak for the coalition because we have not reviewed that system. I have thought personally that the problem of the complexity of the issue and the different industries made a total system applicable to all industries almost impossible. I think something that was voluntary on the side of the defendant as well as the plaintiff might work. The Dodd bill, of course, gives the option to the plaintiff. I think the defendant ought to also have that option. I think that might take out some of the difficulty. I am concerned with Pat Head's comments as well.

But economic loss, meaning lost wages, as interpreted by the court are not lost wages as most people believe. Those can be huge sums of money. We hardly pay anything beyond that, but that can be a very—to have a compensation system that pays lost wages in those amounts automatically would be very, very expensive, I think.

Mr. **Jenkins.** In Michigan there is a mediation system that works I think in a similar fashion to what you are discussing, Senator. An award is issued, and the plaintiff has the option to take it, and the defense has an option to take it, and then if not, there are certain penalties if you lose a case by a certain percentage above and so on. It has not worked in products liability work. I cannot say why. But when I say well, it sounds good to me, especially when the mediation award is $1, I like that. I had one where they awarded $34,000. We accepted it. The plaintiff looks at it and says well, I am getting $180 a week tax free under workmen's comp; my medical is taken care of; let us roll the dice. And the plaintiff's lawyer claims that he is trying to advise the plaintiff to get out, but he wants to roll the dice. So you go ahead with them. And I think all of those flies in the ointment, or whatever you want to refer to them as, I do not know how you would legislate them out or legally push them out.

Mr. **Connor**. The NAM product liability committee has been very interested in Professor O'Connell's proposals. As a matter of fact, just within the last couple of months we consulted at some length with him. The one thing I can say is that there is a lot more to be said on the subject of his proposals than there was time for him to say this morning. My personal view is that there is a great deal of merit in them. NAM has not pursued his proposal because there seems to be an instinctive reaction against them when they are presented in the political arena. This notion that the manufacturer is going to be able unilaterally to decide whether or not to pay that economic loss rubs a lot of people the wrong way.

When it is thought through, I think, though, it makes a fair amount of sense. There are enormous incentives for the manufacturer to make those payments, since in a typical case litigation expenses are going to be far, far greater than that payment. I think they are worth pursuing.

And just one last footnote. Professor O'Connell did not mention it this morning, but as the committee may know, there is a case in which his system is being used successfully, and that is in connection with football helmets being used in high schools. His approach is being used on a voluntary basis there and very, very successfully.

Senator **Kasten**. Senator Gorton.

Senator **Gorton**. Thank you, Mr. Chairman.

Just very briefly, I want to associate myself with Senator Danforth's remarks about the future of this process with the sole amendment of adding the concern of State officials and judges to those who are quite interested in this process, and point out that this process that Senator Kasten—while none of them really think that we can come up with something with which everyone would agree, at least can limit the opposition, can bring together enough of the interested groups greatly to enhance the chances of solving the problem rather than simply having it come back in the next Congress and the Congress after that.

Just for my own background I have one question of you, Mr. Jenkins. You stated how your insurance premiums had increased, as I remember, 100 times from $4,000 to $400,000. How many sweepers do you manufacture a year and sell?

Mr. **Jenkins**. Well, we go across the board broad spectrum. We only sell 25 runway sweepers a year, for instance. We sell a couple thousand roofing sweepers a year. Therein lies our problem.

Senator **Gorton**. What are your gross sales?

Mr. **Jenkins**. Well, the gross sales are about $18 million total sweeper business with combined bristle manufacturing, and we do some other things. We are not just in the sweeper business.

Senator GORTON. You say you had this hundredfold increased insurance even though you have not lost a judgment in court in product liability cases?

Mr. JENKINS. Yes. Now, the insurance companies before we took control of the operation would settle cases without even saying boo to you. They will settle cases for $150,000, $175,000, $265,000, those type of things. That is what happens to you. I had one settle recently in Chicago for zero in our instance, but the rental yard that rented the sweeper paid a half a million dollars. Now, that will come back to haunt us, both in increased premiums and the attractability for the plaintiff's bar to find us again.

Senator GORTON. So you are not claiming that the insurance companies have acted arbitrarily. They are reflecting what they felt they had to settle for in their premiums.

Mr. JENKINS. No. I say they have acted arbitrarily, yes. They are some of my worst enemies, just below the lawyers.

You know, it is a laughing matter in one instance, but I like to cry about it, too. But you know, I am seriously discussing with a South Korean company manufacturing roofing sweepers. This roofing sweeper, by the way, was designed for Holly Farms in North Carolina to sweep chicken manure. We used to call it CS-36.

We are looking with a South Korean firm in having them manufacture that sweeper and ship it in here in a carton. They are going to redesign it so that it is no longer ours, ship it in here in a carton, and we will sell it the same as we have sold for the roofing trade and get ourselves the hell off the hook. We do not know any other way.

Do you want to export jobs? I know of a German company that came in here and has backed back out because of the product liability thing. You can just—it is a horror story that the little guy especially has this gnawing, clutching fear. I am old enough so, what the hell, I can go out of business, and I am happy anyway, but I have got 130 people that own pieces of this company; they are going to eventually own it all. Hell, you know, I hate to give them a pig in a poke. This is why I am interested in seeing some kind of fairness, or if it was not just fairness, just certainty. Somebody said when the hell did your mother ever tell you it was going to be fair. True, but let us have some certainty: the statute of repose, things of that nature that we need so badly. And I am just concerned that you guys are going to chew on this now for another 5 or 10 years, if you are reelected and keep on going.

But this kind of thing bothers me.

Well, I guess I keep getting my foot deeper in my mouth, but I just try to convey this frustration that being in business, which should not be related to the law business——

Senator GORTON. Mr. Jenkins, I have only got 5 minutes, and I have other questions to ask.

Mr. JENKINS. OK. Just a second. The roofing trades by their own figures, a nine-man roofing company has a lost-time accident every single day. Now, what the hell does this indicate? It indicates these people are careless. But now they have found the golden goose. You blame something. The tar kettle tipped over because it is not stable. The wheelbarrow tips over because you should have two wheels on it, not one. The sweeper, not one of our sweepers has ever fallen off a roof in one of these accidents. Is that not amazing? The sweepers are smart enough to stay on the roof, but the roofer is not. Alcoholism, 23 hours a week are the time they spend in bars.

Senator **Gorton**. Mr. Jenkins, I am really going to have to interrupt you or ask another question, if I may.

Mr. **Jenkins**. I am sorry.

Senator **Gorton**. Mr. Head, if you were to assume that there would be changes in specific aspects of State law, for example, prohibition of pain and suffering awards in strict liability cases, or maybe even the elimination of strict liability altogether, together with a statute of repose, statute of limitations, rule on joint and several liability and the like, why do you still believe it is necessary to adopt uniform Federal standards of negligence? Do negligence standards differ all that much from one State to another?

Mr. **Head**. Yes, they do. And I think some of the things you said are already in the Kasten bill, and I believe you have some in your bill, and I think you are going in the right direction in regard to national tort reform.

I think the only problem we have is the second stage of Dodd and Gorton which open up a whole new Pandora's box.

Senator **Gorton**. No, no. What I am asking specifically about is why, if you have national standards in these other areas, a national rule related to negligence, which seems to me to be a pretty standard definition across the country, is essential to the kind of reform about which you are speaking.

Mr. **Head**. I think in practice it does not fall out in any of the uniform standards. And the design area which is in the Kasten bill is probably the centerpiece of the question of how design negligence is handled State by State, and it differs.

Senator **Gorton**. I would appreciate it if you would submit to us some examples of areas in which the negligence standard or definition has had a significantly different interpretation in one State from another.

Mr. **Head**. I would be happy to.

Senator **Gorton**. Thank you.

Thank you, Mr. Chairman.

Senator **Kasten**. There are further questions that I think some of us may have, but at this time we are going to move to panel No. 3, and we will get back to you with certain questions for the record.

Our next panel is Mr. Kimmelman, Ms. Lipsen, Mr. Nishimura, Mr. Goffman, and Ms. Gilbert.

The committee will come to order. Our first witness on this panel is Mr. Gene Kimmelman, legislative director of the Consumer Federation of America.

STATEMENTS OF GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA; LINDA A. LIPSEN, LEGISLATIVE COUNSEL, CONSUMERS' UNION; GLENN NISHIMURA, EXECUTIVE DIRECTOR, HALT INC.; JOSEPH GOFFMAN, STAFF ATTORNEY, PUBLIC CITIZEN/CONGRESS WATCH; AND PAMELA GILBERT, STAFF ATTORNEY, U.S. PUBLIC INTEREST RESEARCH GROUP

Mr. KIMMELMAN. Thank you, Mr. Chairman, Chairman Danforth, members of the subcommitte, I would like to start off by commending the committee for taking up the issue of compensation for people injured by defective products.

We have for a long time believed that this is the issue in product liability that the Congress should be addressing, and we are happy to see you begin the process with these hearings.

But, of course, this is really not an easy issue. As we tried to determine what to do about people injured by defective products, who are not compensated, we had to start by finding out who they are and what other compensation they may receive for their injuries from other sources.

So from a preliminary look, let me just give you a few indications of what we found. From the Consumer Product Safety Commission, we found that there are 30 million product-related accidents annually—30 million. Then according to the Department of Health and Human Services, 10 percent of the population has no medical insurance and another 10 percent has no medical insurance for part of the year.

That means almost 50 million people at any one point in time lack health care coverage. And, of course, probably an equal number, if not more, have inadequate health care coverage, particularly catastrophic coverage.

Then we looked to workers' compensation which covers over 90 percent of the workforce in this country and found, as you heard this morning, that there are major gaps in workers' compensation for coverage of occupational diseases—long latency diseases.

Then, of course, there is the disability insurance program under Social Security, which for longer disabilities gets put into the Medicare Program, which particularly deals with the elderly population, and then of course there are special programs for low income people like Medicaid. There are private pensions, there is black lung, there are veterans' benefits, and other programs.

And what does all this mean? To tell you the truth, we can't really determine because there is no data that shows who gets compensated for one and not the other, or which of these people are also people who are injured by dangerously defective products and may or may not recover. Who falls between the cracks in our tort system? We have not really been able to determine that. But of those who do, which ones lack adequate coverage for their losses? It is very difficult to determine that from this data.

So although we believe it is very important to move forward on this issue, we want to point out the complexity of compensation—not knowing precisely who needs it, what groups of people we want to cover, what groups of people go uncompensated. And because of that, we have to take a rather general sweep at compensation proposals at this point in time.

So let me just point out the principles that we think are important in addressing compensation. First of all, we believe that a compensation system must maintain incentives to develop, make safer products;, secondly, that a compensation system must provide adequate compensation for those injured by unreasonably defective products; and third, that we need swift recovery. We need to reduce transaction costs so that people who have losses, who need recovery, get the money quickly.

Now, just looking at the compensation proposals before the committee today, Senator Dodd and Senator Gorton's proposals, we wanted to raise a number of concerns that relate to them.

First of all, both leave much to be desired in terms of assuring swift recovery for injured parties. As Professor O'Connell mentioned today, we believe they are just much too complicated in terms of the eligibility standards—who qualifies and who does not qualify for compensation, what defenses can be raised, what arguments can be made. We are fearful there will be considerable litigation of this issue itself.

Senator Gorton's proposal takes a very interesting approach to this issue, including very strong penalties for those who challenge a request for compensation. At this point we are uncertain whether those penalties would work. It is an interesting approach.

Then again, both proposals are too restrictive in terms of recoveries by those injured by defective products. We are worried about what is compensable. Although Senator Gorton's proposal provides maybe a greater opportunity to recover something between the State and Federal options, we believe that it is inadequate, as is Senator Dodd's, because it restricts recovery for noneconomic loss. Although pain and suffering may not be quantifiable, they are nonetheless real, and we believe they appropriately should be covered in a compensation scheme.

And finally, because of these major problems in just determining whether the compensation scheme will work, will reach a swift resolution, will provide adequate recovery, we find it hard to believe that either proposal truly will preserve incentives for the manufacturer to design safer products.

As you heard this morning, there is great dispute as to what really leads to product safety. We are concerned that with the great uncertainty as to how a compensation system works. as to who needs it, who would be covered we cannot make a determination as to what effect such a proposal would have on product safety.

In conclusion, I would just like to say that these proposals are a good start in an effort to understand the particular needs for compensation and the best system to meet those needs. We hope to continue to work with the committee to come up with a system that meets the goals of swift, adequate compensation for those injured by defective products while also maintaining the important product safety incentives of our products liability laws.

Thank you.

[The statement follows:]

Statement of Gene Kimmelman, Legislative Director, Consumer Federation of America

Mr. Chairman and members of the committee, I am Gene Kimmelman, Legislative Director of the Consumer Federation of America (CFA). CFA is a coalition of over 200 national, state, and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

We appreciate this opportunity to express our views on alternative compensation schemes for product-related injuries. CFA is encouraged that the committee is beginning to investigate the need for compensation systems that augment the consumer protection attributes of product liability law. We hope these hearings will lead to a better understanding of the inadequacy of current compensation for product-related injuries, and methods to expand and expedite recovery for the undercompensated.

INTRODUCTION

CFA commends the efforts of Senators Gorton and Dodd to highlight the compensation needs of consumers injured by defective products. We believe the Dodd and Gorton proposals represent an important starting point for analyzing nonadjudicative methods of providing fair, adequate and speedy compensaton for product-related injuries.

Unfortunately, both proposals do more to raise than answer questions about how a compensation scheme can preserve incentives to design safer products and ensure swift, adequate compensation for those injured by defective products.

I. OCCUPATIONAL DISEASES/TOXIC TORTS

If a compensation system is meant to distribute benefits equitably to those injured by defective products, it must provide a reasonable opportunity to recover damages for all types of product-related injuries. Yet it is difficult, if not impossible to find a legal standard that adequately deals with the relationship between all types of products and all product-related injuries. Yet it is difficult, if not impossible to find a legal standard that adequately deals with the relationship between all types of products and all product-related injuries.

For example, under both the Dodd and Gorton proposals, it would be extremely difficult, if not impossible for individuals injured by exposure to toxic substances to qualify for compensation. The paucity of medical and scientific information about many toxics makes it virtually impossible to establish the causal nexus between toxic exposure and injury, as required under Title II of the Dodd and Title III of the Gorton proposals.

In effect, these proposals offer nothing to a large segment of the population that needs compensation the most—those who suffer from occupational diseases or injuries resulting from exposure to toxic substances—and offer reduced benefits to those who fare best under the tort system. To achieve distributional equity, this imbalance must be corrected.

II. SWIFT RECOVERY/TRANSACTION COSTS

For a compensation system to replace lengthy litigation with swift recovery for product-related injuries, it must offer a simple, speedy method of determining which injuries qualify for compensation. Swift resolution of claims can be achieved by defining eligibility for compensation in a manner that makes it economically advantageous not to challenge eligibility determinations. Three possibilities come to mind: (1) a simple eligibility determination like "work-relatedness" for traumatic injuries in the workers' compensation system; (2) stiff penalties for challenging a claim; and (3) a combination of simplicity and penalties.

Neither the Gorton nor Dodd proposal provides adequate assurances that compensation claims would be resolved without lengthy, costly litigation. In each case, the eligibility standard involves a determination that is often vigorously contested in current product liability litigation: how "unsafe" (Dodd) or "unreasonably dangerous" (Gorton) a product is; whether the unsafe or unreasonably dangerous aspect of the product caused the injury (Dodd and Gorton); whether the consumer was aware of the danger and the harm it could cause but nevertheless proceeded to use the product (Gorton); whether the injury was caused by an open and obvious danger of the product (Dodd); whether the injury was caused by someone altering or modifying the product (Dodd); whether the injury resulted from voluntary and unreasonable use of the product (Dodd); whether the injured party's behavior involved an extreme departure from accepted standards of care and attention (Dodd); and whether the injury resulted from a common way of using the product or was in fact a use anticipated by the manufacturer (Dodd). With all of these contestable issues and a great deal of money at stake, it is hard to believe that compensation benefits would be paid swiftly under either scheme.

Similarly, both proposals include penalty provisions for failure to pay compensation benefits that are unlikely to assure swift resolution of claims. Financial penalties would be assessed in both schemes against manufacturers who lose their court challenge of a claim or, under the Gorton proposal, make an unreasonable settlement offer. Although the Gorton proposal's penalties are considerably stronger than Dodd's, in most respects these litigation penalties differ little from the current "penalties" involved in all litigation; if you lose, you pay a sum that may be considerably higher than your final settlement offer.

While such penalties may reduce the number of claims fully adjudicated, they are not likely to prevent delay in resolving disputes. Unless manufacturers and product sellers lose most compensation challenges—a dubious assumption given the many defenses available to them—delay and bluff would be as important a bargaining tool in compensation negotiations as in current litigation. Due to their need for quick cash to cover injury-related expenses, many consumers would feel the need to settle for less money than they may deserve, if in doing so they avoid protracted litigation and delayed payment of damages. Therefore, it is difficult to imagine the Dodd and Gorton penalty provisions overcoming incentives for manufacturers to delay payment of compensation benefits.

III. DAMAGES

A fair compensation system must include recovery for all the harm caused by defective products. While some forms of harm are difficult to quantify, like pain and suffering, they are as real as injuries whose treatment can easily be translated into dollars spent for health care or lost earnings.

Both the Dodd and Gorton proposals inappropriately limit recovery of compensation benefits to net economic loss. Pain and suffering, important elements of tort recovery, are not compensable under either proposal. This arbitrary limitation on recovery only makes sense if the purpose of a compensation system is to save money—hardly a goal that would further consumers' interest in adequate compensation for all product-related injuries.

IV. SAFETY INCENTIVES

To ensure that accident prevention remains an important goal of our product liability laws, it is essential that any new compensation system not reduce manufacturers' incentives to design safer products. No combination of compensation and tort law adjustments that provides less than full recovery under a strict liability standard, or its equivalent, would serve consumers interests in adequate product safety and compensation.

Both the Gorton and Dodd proposals limit full recovery of damages to situations where a consumer injured by a defective product can prove that the manufacturer or product seller was negligent. When added to the many impediments to swift, adequate recovery from the compensation systems, these changes in tort law and tort recovery would seriously undermine the safety incentives of current product liability law.

Although both proposals are major improvements over S. 100, Senator Kasten's "Product Liability Act," their many restrictions on full recovery for injuries caused by defective products leave us with concerns simila to those we expressed in previous product liability hearings before this committee. Until a compensation system is devised that ensures swift, adequate compensation and preserves product safety incentives, we believe it is inappropriate to consider changes in the liability standards of product liability law.

CONCLUSION

CFA believes it is important for the Congress to investigate the need for compensation systems that augment the consumer protection attributes of product liability law. We hope to work with the committee to develop proposals that would promote product safety and ensure swift, adequate compensation for consumers injured by defective products.

Senator KASTEN. The next witness on this panel is Linda Lipsen, who is the legislative counsel of the Consumers Union.

Ms. LIPSEN. Thank you, Mr. Chairman and members of the committee. I am Linda Lipsen, representing Consumers Union, the publisher of Consumer Reports magazine. Thank you very much for inviting me here today to discuss compensation schemes for victims of dangerous products.

For too long now this issue has been mired in debate over provisions that would make it more difficult for consumers to obtain compensation for their injuries. We are very heartened by the fact that this committee last month rejected S. 100, the Product Liability Act. We were also very encouraged by Senator Dodd's testimony just last week that compensation schemes should not be attached to S. 100.

The defeat of S. 100 and the provocative initiatives of Senators Dodd and Gorton have allowed those interested in product liability reform to focus their attention on compensation rather than limitations and restrictions on victims pursuing their remedies. Senator Dodd and Senator Gorton are offering new ways of looking at the product liability landscape. These proposals, of course, will require extensive study and input from manufacturers, consumers, labor, State groups, legal scholars, and experts in workers compensation, occupational disease, and automobile no-fault. We are looking forward to working with this committee and these groups to structure a workable compensation program which maintains the incentives for safety and adequate compensation for victims.

At this early stage in the process, though, we are unable to evaluate all the specifics of these initiatives. However, we would like to present what we believe are the essential elements for establishing fairer product liability law and share with you some of our concerns about the proposals presently on the table.

First, victims should be allowed to make an informed and meaningful choice as to whether to proceed in tort or through an alternative compensation route. We would have serious misgivings about any compensation scheme where the victim was encouraged to assess the value of his claim or project his future damages without the advice of an objective third party.

First of all, under Dodd, for instance, we are concerned that a victim pursuing a claim without a lawyer will receive all the information about the claims procedure from the manufacturer—a potentially liable party. The victim will be at a tremendous disadvantage because the manufacturer will retain a lawyer, especially in the larger claims. We foresee that a victim proceeding without counsel could unwittingly damage his case and thereafter lose the option of proceeding in tort. Second, an injured consumer who has medical bills and the multitude of other expenses accompanying an injury may not be able to act in his or her own best interest.

While we believe that the tort system may be too expensive, we do not feel that the solution to this problem is a compensation program with incentives for victims to proceed without counsel. Accordingly, there should be some provision for victim's recovery of reasonable attorney fees in addition to the amount established for other damages in a compensation system.

Transaction costs will be substantially reduced in a compensation program if there are fewer number of issues in dispute. Extensive discovery then would not be as necessary. Defense attorneys use discovery as a tactic for delaying the resolution of claims. These dilatory activities are responsible for the lion share of the costs of the system. In a system where the goal is to provide speedy recoveries for victims, this tactic will not be effective or useful.

In order for a compensation system to be a workable and a viable alternative to tort, recoveries must be expedited. The current adversarial mechanism by which victims recover is exceedingly slow. A consumer may wait as long as 5 years before receiving the first dime from the defendant. Where the process is delayed, victims are under extreme economic pressure to settle the claim on any terms available.

If the compensation scheme, however, were to provide quick and adequate recoveries, victims will use it. It is necessary for the compensation system to be simple. Therefore, the number of issues, defenses, and burdensome proof requirements should be limited to avoid contentious, time consuming, and expensive litigation.

Moreover, consumers should be able to pursue their full damages in the compensation system in order to make them truly whole. If compensation is based only on factors such as wage loss and medical bills, the victim's recovery would be unfairly limited. All injured consumers are not wage earners. A fair compensation system must not determine damages based on a week consisting of 40 hours. Nonmarket time has to be includedin the equation.

We are concerned that retired people, infants, children, nonworking mothers, and other unemployed or underemployed people may not receive adequate compensation under either the Dodd or the Gorton plans. We applaud Senator Gorton for expanding the scope of recoverable damages beyond the traditional wage loss measure and beyond mere physical personal injury. His proposal includes medical monitoring, rehabilitation, preventive care, and replacement service loss. However, we feel that a measure of damages for the loss of enjoyment of life and lost wage capacity must be developed. We are looking forward to working with the committee to explore all appropriate measures of damages.

The compensation scheme also should include provisions for toxic tort and occupational disease recoveries. Unfortunately, under both the Dodd and the Gorton proposals, victims of exposure to toxic substances would have no easier time collecting damages than they currently experience in personal injury litigation and workers compensation.

The causation standard contained in both plans is much too rigid and will prevent victim's compensation for toxic tort type injuries. Additionally, the introduction of complex causation type evidence will defeat an important objective of the compensation scheme—speedy recovery.

We feel that a measure of damages for the loss of enjoyment of life and lost wage capacity must be developed.

An alternative compensation scheme must feature incentives for safety, an integral objective of product liability law. It is not entirely clear to us whether the Dodd and Gorton proposals will foster this goal. We will carefully review all proposals emerging from this committee to determine whether they encourage the safe production of products and whether they adequately protect consumers.

Senator Gorton's proposal largely retains State law for maintaining actions in tort. Therefore, consumers would have the option of pursuing compensation based on the strict liability theory. Senator Gorton's proposal also enables consumers proceeding under State law to obtain damages that would have been available under the compensation scheme, if they are unable to prevail under State law. Although we disagree with the unnecessary limitation on pain and suffering damages, we do appreciate the greater flexibility of the Gorton plan. It is less disruptive of the rights of injured consumers.

We are concerned that under the Dodd and Gorton plans, the manufacturer would incur losses due to injury, only where the victim is not compensated from other sources. Accordingly, it would be possible for a manufacturer to market a hazardous product and completely evade financial responsibility for any injuries that may result. We believe that where manufacturers bear these losses, there are greater incentives for safety.

We applaud the committee for attempting to mitigate the array of problems facing victims of dangerous and defective products. Senator Dodd's and Gorton's proposals make admirable, initial strides towards achieving such a goal, though we feel that numerous revisions are necessary if the product victim's interests are to be fully promoted.

I appreciate this opportunity to testify today, and we look forward to working with this committee to achieve the ends outlined in this testimony.

The CHAIRMAN. Thank you.

Mr. NISHIMURA. Thank you, Senator.

I appreciate the opportunity to testify today on behalf of HALT, an organization of Americans for legal reform. HALT is a national, nonpartisan, public interest group working to make the legal system more accessible, less costly, and fairer to all citizens.

Since our inception in 1978, HALT has experienced significant growth in membership which today numbers in excess of 160,000 Americans. We think that this growth is ample evidence of the public's concern for the need for legal reform.

I want to first recognize Professor Jeff O'Connell who we believe is one of the most creative and innovative contributors to discussions of reform of the tort system, and also note that he serves and has for years served on the board of advisors to HALT.

We are frankly encouraged by the turn to consideration of a compensation system. Frankly, the tort system has undoubtedly produced a number of spectacular awards for injured consumers, but these awards mask more important facts, that too many injured consumers get no compensation at all, that the system compensates lawyers more handsomely than it does victims, that victims can wait 5 years or more to recover.

I am here because HALT believes that the tort system is not working for injured persons, and though reform of tort law is often spoken of in terms of it being promanufacturer, clearly consumers potentially stand to realize significant gains in a compensation system. We believe that reform of the tort system must focus on the injured parties and discussion of alternative compensation systems is a promising sign for consumers. It moves the focus away from trying to find a deep pocket or trying to wear down an opponent with delaying tactics and instead toward trying to answer the question of how to adequately compensate injured victims.

An alternative system should attempt to compensate as many deserving victims as quickly, as simply, and as fairly as possible while preserving incentives for manufacturers to produce safe products.

We believe of relevance to this discussion is an analysis of the success of no-fault auto insurance. The uncertainty of recovery for auto accident victims under the fault system is so bad that the former chairman of the full committee, Senator Warren Magnuson, used to say you can get better odds in Las Vegas.

The major deficiencies of the fault system for auto accidents are that it fails to compensate a large number of injured persons, it allocates benefits poorly to those who it does pay, it is slow, and it is inefficient and overly costly. Numerous studies have documented these problems, and these problems have led HALT as well as other consumer groups to support enactment of no-fault laws that provide injured persons with high levels of first party no-fault benefits in a timely manner while still permitting lawsuits in case of serious and permanent injuries.

A series of comprehensive reports over the past 10 years have documented the success of good no-fault laws, most recently the DOT study reported to this committee just a month ago. And while there are some important differences in how people fared under the fault system with respect to product injuries, there are striking similarities.

We thought it was scandalous in auto cases where attorneys got about 60 percent of what victims got. When the system actually gives attorneys more than victims, as the product liability tort system does, it is time to find a better approach. In addition, in the fault system for products, one-third of the claimants recovered nothing. The people who incur the greatest loss recover far below their economic losses, and it takes injured people 5 years to recover the average amount paid to victims. Once again, this figure makes the auto victims' outrageous waiting period of 16 months seem like a short time.

Having examined the faults of the fault system and expressed our preference for first party systems, HALT nevertheless appreciates that it is a difficult matter to design an alternative claims system to work here because of the difficulty of defining the situations that could give rise to recovery. This and other issues obviously must be ironed out. And while HALT believes that differences between auto and product accidents warrant different approaches, we also believe that the Dodd and Gorton amendments represent a major step toward producing a more rational system for injured persons. We think that the combination of a speedy claims system with a residual tort system could well provide victims with many of the same benefits that good no-fault laws have produced, faster payments of economic losses, payments according to such losses, and a dramatic shift of dollars from attorneys to injured people.

In closing, some attention is needed to the key issues raised by the difference between auto and products. First, what event should entitle a person injured by a product to recover in the claims system? We think there should be a standard that is at once simple to understand and fair to most parties. In general, we think recovery should be permitted where the product is the major cause of the injury and the injured person was not in a reasonable position to avoid the injury.

In trying to devise the best possible triggering mechanism, we would urge the committee, in the words of Guido Calabresi, dean of the Yale Law School, not to get caught up in the "chase for perfection." No bill will be able to address perfectly every hypothetical and real world situation, but remember, you are not measuring the new system against perfection, you are measuring it against a very imperfect fault system. What should be sought is a system that is demonstrably better than the present one.

Second, in order to achieve significant saving, there should be incentives for people to use the claims system and disincentives for them to use the fault system. Incentives for the use of the claims system relate to level of benefits and speed of compensation while disincentives relate primarily to the use of the negligence standard in the fault system.

Third, you should carefully assess the question of incentives for safety. The present system relies solely on the unpredictability of the fault system, and that unpredictability may well lead manufacturers to take greater risks because of the uncertainty of having to pay. As long as you permit an injured person to choose between the claims system and a fault system, I think you will provide greater safety incentives than exist today.

And finally, with respect to the question of incentives for safety, we think some of the incentives are vitiated by the widespread availability of insurance, and it may well be that in the interests of reinforcing safety incentives of the residual tort system, the committee might want to consider uninsurable civil fines against manufacturers who meet the standards that presently trigger punitive damages.

Mr. Chairman, we believe the subcommittee is now addressing the proper product liability questions and is headed in the proper direction. We believe an alternative claims system can achieve significant benefits for injured persons. We commend Senators Dodd and Gorton for their leadership in this effort and stand committed to continue to work with you to devise the best possible legislation to redress the faults of the fault system, paying more dollars to victims in a timely fashion and fewer dollars to attorneys while strengthening incentives for manufacturers to produce safe products. Thank you.

[The statement follows:]

STATEMENT OF GLENN NISHIMURA, EXECUTIVE DIRECTOR, HALT, AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to testify on behalf of HALT, An Organization of Americans for Legal Reform. HALT is a national, non-partisan, public interest group working to make the legal system more accessible, less costly, and fairer to all citizens. Since its inception in 1978, HALT has experienced spectacular growth in membership, which today numbers in excess of 160,000 Americans. This growth is ample evidence of the public's concern for the need for legal reform.

HALT pursues its goals through a variety of educational and advocacy projects. One such educational project is the development, publication and distribution of Citizens Legal Manuals. Covering topics that range from Shopping for a Lawyer to Small Claims Courts to Probate, our manuals are designed to increase the ability of citizens to undertand and manage their legal affairs. All of the eight manuals presently available are written in plain English and encourage readers to become informed users of legal services. In seven short years, HALT has distributed over a million of these educational and useful manuals.

HALT's advocacy activities are generally directed at simplifying the court system, eliminating unnecessary litigation, and increasing public participation in attorney regulation. Through support of small claims court legislation; no-fault auto insurance; mediation, arbitration, and other alternatives to the courtroom; plain language bills; statutory wills; probate reform; and other measures; HALT has worked for a legal system more accessible and more favorable to those who must use it.

In the past, our investigations have led us to oppose attempts to enact federal uniform product liability law. For example, HALT went on record in opposition to S. 44 in the last Congress. Our position was based on our belief that the problem in the product liability area is with the tort system itself. S. 44 did not sufficiently address solutions to the problems of the highly inefficient tort system with its long delays, huge transaction costs, and far-too-uncertain results.

In this Congress, S. 100 suffers from the same shortcomings.

The tort system has produced a number of spectacular awards for injured consumers but these awards mask more important facts. . . . that too many injured consumers get no compensation at all, that the system compensates lawyers more handsomely than it does victims, that victims wait five years to recover.

Reform of the tort system must focus on the injured parties. Discussion of alternative compensation systems is clearly a promising sign for consumers. It moves the focus away from trying to find a deep pocket or trying to wear down an opponent with delaying tactics and toward answering the question of how to adequately compensate injured victims. An alternative system should attempt to compensate as many deserving victims as quickly, as simply, and as fairly as possible, while preserving incentives for manufacturers to produce safe products.

We believe that these objectives are attainable.

Of relevance to this discussion is an analysis of the successes of no-fault automobile insurance laws. HALT's support of no-fault auto insurance flows from its promise to remedy the deficiencies of the fault system in meeting victims' needs. The uncertainty of recovery for auto accident victims under the fault system is so bad that the former Chairman of this Committee, Senator Warren Magnuson, used to say that "you can get better odds in Las Vegas."

A review of the deficiencies of the fault system for auto accident victims and the successes of good no-fault laws in solving these problems would be appropriate here, because I think they are highly relevant to the issues that face this Committee with respect to injuries caused by products.

The major deficiencies of the fault system for auto accidents are that it fails to compensate a large number of injured persons; allocates benefits poorly to those it does pay; is slow; and is inefficient and overly costly. First, Professors Robert Keeton and Jeffrey O'Connell and then the Department of Transportation, in an exhaustive 26 volumes study published in 1971, documented the "faults" of the fault system:

About half of all victims never recover a penny from auto liability insurance;

Of those who do recover, people with economic losses between $1 and $499 recover 4½ times their losses, while those with losses over $25,000 recover only 30 percent; and

The average time for a person to recover is 16 months; and victims receive 44 cents from the premium dollar, while plaintiffs' and defendants' attorneys receive about 26 cents.

These problems, among others, led HALT, as well as Consumer Federation of American and Consumers' Union, to support enactment of no-fault laws that provide injured persons with high levels of first party, no-fault benefits in a timely manner, while still permitting lawsuits in cases of serious and permanent injuries.

A series of comprehensive reports over the past 10 years have documented the successes of good no-fault laws in providing a more expeditious and humane system for auto accident victims, without increasing the rate of accidents. Starting in the mid-1970's, excellent reports were done by the Council on Law Related Studies, the Consumer Protection and Finance Subcommittee of the House Commerce Committee, and the U.S. Department of Transportation and, most prominently among individual commentators, Jeff O'Connell, all of which showed that good no-fault systems are eliminating the deficiencies of the fault system.

We are pleased to note that just last month, the U.S. Department of Transportation forwarded to this Committee an exhaustive study on state nofault experience which shows that no-fault, where done properly, is matching its promise with performance. Among the study's major findings were:

"Almost twice as many injured auto accident victims received some compensation from auto insurance in no-lawsuit, no-fault states as in traditional auto insurance states;"

Eighty point six percent of no-fault claimants received their first payment within 90 days, whereas only 46.2 percent of fault claimants received their first payment in that time period; and

No-fault states with unlimited medical and rehabilitation benefits are restoring seriously injured people to productive lives.

Other studies have shown that the amount paid to victims from the no-fault portion of the premium is 75 cents, as compared to only 44 cents under the fault system. It should be noted that the entire 75 cents goes to compensate people for economic losses, while only 22½ cents of the 44 cents is for economic losses (the rest is for non-economic losses).

One final finding from the new DOT study may be relevant here: "that there is no significant difference between the pre/post ratio of (accidents in) no-fault states and the group of tort states."

These results lead us to believe that a similar solution for product injuries might well produce similar positive results.

While there are some important differences in how people fare under the fault system with respect to product injuries, there are striking similarities. For HALT, as an organization interested in legal reform, it is a red flag when you show us a system—such as the product liability system—which pays attorneys more than injured persons. We thought it was scandalous in auto cases where attorneys got about 60 percent of what victims got. When attorneys actually get more than victims, it is time to find a better approach.

There are a number of other distressing deficiencies in the fault system for products:

One-third of the claimants recover nothing and the people who incur the greatest losses recover below 40 percent of their economic losses, not to mention nothing for non-economic losses; and

It takes injured people 5 years to recover the average amount paid to victims. Once again, this figure makes the auto victim's outrageous waiting period of 16 months seem like a short time.

Having examined the faults of the fault system and expressed our preference for first-party systems, HALT nevertheless appreciates that it is a difficult matter to design an alternative claims system to work here because of the difficulty of defining the situations that should give rise to a recovery. In auto accidents, you know what the event is that triggers recovery. Here, you have to design a system that will compensate the unknowing victims of DPT shots but not the person who is injured tripping over a vacuum cleaner in the living room (at least not permit that person to recover from the vacuum cleaner manufacturer).

There is a further problem here. In the auto situation, it is clear that drivers have little incentive to maim themselves, so you don't have to worry very much about incentives for safety. With respect to products, you must have a system to provide strong incentives for product safety. We think that requires a residual tort system, but we're not sure what the exact nature of that system should be.

While HALT believes that the differences between auto and product accidents warrant different approaches, we believe that the Dodd and Gorton amendments represent a major step towards producing a more rational system for injured persons. We think that the combination of a speedy claims system with a residual tort system could well provide victims with many of the same benefits that good no-fault laws have produced: faster payment of economic losses; payment according to such losses; and a dramatic shift of dollars from attorneys to injured people.

In closing, some attention is needed to the key issues raised by the difference between auto and products accidents. First, what event should entitle a person injured by a product to recover in the claims system? We think it should be a standard that is at once simple to understand and fair to most parties. In general, we think recovery should be permitted where the product is the major cause of the injury and the injured person was not in a reasonable position to avoid the injury. In trying to devise the best possible triggering event, we would urge the Committee, in the words of Guido Calabresi, Dean of the Yale Law School, not to get caught up in the "chase for perfection." No bill will be able to address perfectly every hypothetical and real-world situation. But you are not measuring the new system against perfection. You are measuring it against the very imperfect fault system. What should be sought is a system that is a demonstrable improvement over the present one.

Second, in order to achieve significant savings, there should be incentives for people to use the claims system and disincentives for them to use the fault system. The incentives for use of the claims system relate to the level of benefits and the speed of compensation, while the disincentives relate primarily to the use of a negligence standard in the fault system.

Third, you should carefully assess the question of incentives for safety. The present system relies solely on the unpredictability of the fault system, but that unpredictability may well lead manufacturers to take greater risks because of the uncertainty of having to pay. The greater certainty of recovery in a claims system, even at lower levels per case, may well provide incentives for safety that are as great, if not greater, than the present incentives contained in the fault system. As long as you permit an injured person to choose between the claims system and a fault system, I think you will produce greater safety incentives than exist today.

Finally, with respect to the question of incentives for safety, we think some of the incentives are vitiated by the widespread availability of insurance. Thus, in the real world, negligent manufacturers don't pay anywhere near the total cost of the injuries they cause. Their real risks are higher insurance premiums or no coverage. Obviously, insurance performs a useful function for society, but it is important to remember that it also goes a long way toward undercutting any deterrent effect the fault system has now or would have under a Dodd or Gorton type proposal. It may well be that the Committee might want to consider uninsurable civil fines against manufacturers who meet the standards that presently trigger punitive damages.

Mr. Chairman, we believe this Subcommittee is now addressing the proper product liability questions and is headed in the proper direction. We commend Senators Dodd and Gorton for their leadership in this effort and stand prepared to work with you to devise the best possible legislation to redress the faults of the fault system—to pay more dollars to victims in a timely fashion and fewer dollars to attorneys—while strengthening incentives for manufacturers to produce safer products.

The CHAIRMAN. Thank you, sir.

Mr. Goffman.

Mr. GOFFMAN. Thank you, Mr. Chairman. Public Citizen very much appreciates your invitation to appear here today and we commend you, Chairman Danforth, and the members of the committee, for your willingness to explore the broad issues of compensation for victims of defective products. We also welcome the opportunity to participate in that exploration.

In addition, we commend Senators Gorton and Dodd for putting forth concrete proposals in this area, and we appreciate the contribution they have made in that regard.

Because the issues involved here are highly complex and engulfed in unknowns, we feel that we have to proceed with caution and we expect that the committee feels that way also. Any compensation system created here would represent a radical, if not unique, innovation whose functional characteristics and impact would be difficult to determine until after the system went into effect.

For these reasons we hope that these hearings are only the first step in a process that might raise and answer a host of difficult questions. In examining the issues of victim compensation, we urge the committee to be mindful of its most important goal; that is, keeping as many people as possible out of both the compensation system and the tort system by preventing them from becoming the victims of defective products in the first place.

The key to prevention is maintaining the highest level incentives in the marketing of safe products. We have yet to be convinced that a no-fault compensation system by itself can provide a maximum level of incentives for safe products. Rather, in the absence of a demonstration to the contrary, we continue to believe that a strict liability tort system is the most effective instrument for creating maximum safety incentives.

As a result, we remain at least for the moment profoundly wary of any compensation system intended to offset or justify the reduction of product victims' legal rights in tort. We are afraid that such an alteration would simply be self-defeating since it would impair the most efficient device available, and that is prevention of safety incentives.

However, our reluctance to alter current tort law arises not because we disagree with the objectives of you, Chairman Danforth, and of the members of this committee; rather, we believe that the committee must not underestimate the power of a properly functioning compensation system as an incentive for victims to choose compensation over the tort system.

Working from this premise, we consider it critical that the committee approach the issue of compensation by focusing first on designing a no-fault compensation scheme in the expectation that a properly formulated compensation system would prove to be the instrument for meeting the committee's objectives.

As of yet, we are not sure how an acceptable compensation scheme would be constructed, but we believe there are a number of obvious elements that it must contain. The first, of course, is speed and certainty of recovery for victims. We also feel that the claims satisfaction system should be a nonlitigious one. We do not believe that a compensation system would satisfy any of the legitimate objectives either of victims or of sellers and manufacturers if the system merely duplicated the litigation experience.

We also believe a compensation system should provide full compensation. In addition to considering compensation for the full range of traumatic toxic and long latency injuries and diseases related to products, the committee must at least begin with the recognition that compensation should take account of each of the categories of cost which injuries and diseases impose on their victims.

It should also recognize that these costs can persist for the lifetime of these victims. Finally, of course, we would like to see a compensation system that tended to be more, rather than less, inclusive of kinds of victims and kinds of injuries.

We certainly appreciate the fact that Senator Gorton's bill intrudes far less upon current tort law, and we believe that its compensation system makes a somewhat closer approach to a truly no-fault or no-controversy system. We also believe that the system came to grips with the issue of creating proper incentives, but much work needs to be done in that area.

Nevertheless, both bills raise the same degree of concern about their viability, for both establish triggers or thresholds of obligation which involve concepts of causation and of defect or danger.

Senator Dodd's compensation scheme includes, in addition, four defenses to liability for a manufacturer. As a result, these systems may simply shift the forum of controversy, duplicate the inefficiencies and delays of litigation and unduly exclude victims from compensation.

We are also concerned that Senator Dodd's compensation system may simply offer manufacturers an inexpensive means for extracting cheap settlements in much the way that many manufacturers do in the current litigation system. These reservations are not intended to suggest that we are opposed to alternative compensation methods. Rather, they are meant to serve as examples of the kinds of problems that the compensation system must overcome if it is to serve the objectives of this committee and of all the parties involved.

We hope we can continue to work with the committee and with all others concerned here in finding solutions to these problems.

Again, thank you, Mr. Chairman, for the opportunity to participate in these hearings and in the larger process of inquiry.

[The statement follows:]

STATEMENT OF JOSEPH GOFFMAN, STAFF ATTORNEY, PUBLIC CITIZEN'S CONGRESS WATCH

Mr. Chairman and Members of the Committee: Public Citizen very much appreciates your invitation to appear here today. Public Citizen is the public research and advocacy organization founded by Ralph Nader in 1971, with a current membership of 80,000. I am Joseph Goffman, an attorney with Public Citizen's Congress Watch, the lobbying arm of Public Citizen.

INTRODUCTION

We commend Chairman Danforth and the Members of the Committee for their willingness to explore the broad issues of compensation for victims of defective products and we welcome the opportunity to participate in that exploration. We also commend Senators Gorton and Dodd for putting forth concrete proposals in this area. While we object strongly to certain aspects in each of their amendments, we recognize the contribution they have made.

As crucial as we think these issues are, we embark upon this inquiry with much trepidation and we urge the Committee to proceed with caution. The issues involved here are highly complex. Current law provides for compensation systems in specific areas and we believe that the experience with these systems must be studied carefully. At the same time, we all have an empirical handicap. Any compensation system created here would represent a radical, if not unique, innovation, whose functional characteristics and impact would be difficult to determine until the system went into effect. For these reasons, we understand these hearings to be only the first step in a process that must raise and answer a host of difficult questions.

Since we are constrained by the many unknowns we face, we must limit our testimony, in this round at least, to suggesting certain methods or principles the Committee should apply in approaching this subject, describing certain features we believe to be vital to any compensation scheme and discussing briefly our concerns with the proposals put forward by Senators Gorton and Dodd.

I. DESIGNING A COMPENSATION SYSTEM

A. Safety incentives and efficiency incentives

The Committee's most important goal in approaching the issue of victim compensation should be minimizing the need for compensation at all by preventing people from becoming the victims of defective products. No compensation system can satisfy the standards of either humanitarianism or efficiency if it results in a lessening of incentives for manufacturers and sellers to make and market safe products.

We have yet to be convinced that a no-fault compensation system alone can provide the maximum level of incentives for safe products. Rather, in the absence of a demonstration to the contrary, we continue to believe that a strict liability tort system is the most effective instrument for creating maximum safety incentives. As we told this Committee in its March 21, 1985 hearings on S.100, a recent study by the Institute for Civil Justice of the Rand Corporation, entitled Designing Safer Products: Corporate Responses to Product Liability Law and Regulation (1983), concluded that "growing corporate awareness of product liability issues spurred in several instances by suits that resulted in substantial individual judgments against firms increased the willingness of these organizations to establish formal product safety activities." The study also found that product liability had a greater impact on product design decisions than did other social influences such as government regulation.

For this reason, unless and until we see a compensation system that would provide the same incentives for safety as well as adequate compensation for victims we would be unwilling to endorse any compensation system intended to offset or justify the reduction of product victims' legal rights in tort. Such an alternation would simply be self-defeating since it would impair the most efficient device available: trauma and disease prevention.

In addition, this Committee must view one of the goals of a compensation scheme to be the compensation of classes of victims who either are not receiving compensation at all under the present system or are receiving inadequate and/or untimely compensation. At the same time, the Committee must not act in such a way as to create a new class of uncompensated victims. We are concerned, however, that any attempt to balance a compensation system against the curtailment of victims' tort rights would risk producing a new class of uncompensated victims from the groups of victims who now recover under the current system.

Our reluctance to alter current tort law arises not because we disagree with the objectives of Chairman Danforth and the Committee. Rather, we firmly believe that were a compensation system properly designed and put into place alongside the existing tort system it would likely satisfy the objectives (e.g. efficiency and fairness) that Senator Kasten and the proponents of S. 100 as well as Senators Dodd and Gorton claim they want to accomplish. A properly functioning compensation system that offered full and fair compensation for loss in a quick, certain and non-litigious fashion would prove to be a powerful incentive for victims to choose compensation rather than the tort system. As a result, only those with the strongest of claims would have an incentive to brave the rigors of litigation. At the same time, the safety incentives of the current tort system would remain in place.

Working from these premises, we consider it critical that the Committee approach the issue of compensation by focusing first on designing a no-fault compensation scheme—without making the establishment of such a scheme contingent on changes in tort law—in the expectation that a properly formulated compensation system would prove to be the instrument for meeting the Committee's objectives.

B. Ingredients of compensation

Although we are not yet sure how an acceptable compensation scheme would be constructed we believe that there are a number of elements it must contain:

(1) Speed and certainty. Victims must receive payment for their losses quickly and they must be afforded a high degree of certainty at the time they decide to submit a claim to the system that they will recover their losses rapidly.

(2) Non-litigious claim satisfaction. We do not believe that a compensation system would satisfy any of the legitimate objectives either of victims or of sellers and manufacturers if the system duplicated the litigation experience. In designing the mechanism that would trigger manufacturers' and sellers' obligations, the Committee must avoid creating issues that would only shift a protracted process of dispute resolution from the tort system into the compensation system itself. Similarly, the process of evaluating a victims' compensable losses must not engender a lengthy dispute process.

The experience of the Social Security Disability Insurance system should signal caution to the Committee. Claimants in that system are required to make the apparently simple showing that an injury or disability has prevented them from working for a given period of time and that their disability is permanent. Nevertheless, thousands of these cases remain unresolved for years and Legal Services offices across the country devote entire units of attorneys to representing indigent claimants in this area.

To replicate this experience in a product victims' compensation system would defeat the purpose of establishing such a system. The very objectives of protecting victims and reducing inefficiencies and transactions costs for all parties would be lost.

(3) Balancing incentives. We begin with the premise that the very existence of an acceptable compensation system would by itself create a more than sufficient incentive for the vast majority of victims to avoid tort litigation and resort to the compensation system.

Manufacturers and sellers, however, may be confronted with competing sets of incentives regarding the choice between satisfying a claim or creating litigation. Every defense lawyer knows that delay often permits manufacturers and sellers to secure inexpensive favorable settlements with impatient, distressed or straitened victims. As a result, for many manufacturers and sellers, subjecting victims to the stresses and delays of tort litigation may appear preferable to satisfying their claims in an expeditious compensation system. Without proper incentives, these manufacturers would either disdain the compensation system or participate in it only to the extent that it could serve them as a dilatory prelude to eventual full litigation.

At the same time, we can envision companies who, guilty of real malfeasance in the manufacture and sale of their products, might exploit a compensation system as a "cover" by submitting to quick settlements to avoid exposure of their wrong-doing in the course of litigation. In such a case, compensation would actually undermine safety especially if it permitted companies to conclude in a cost/benefit analysis that marketing less than safe products was acceptable. To guard against this, the Committee must consider a compensation system that would be a non-exclusive remedy in certain appropriate circumstances.

In any event, it is essential that the Committee be as careful as possible in sorting the incentives that will be at work upon a party's decision to choose either compensation or litigation. Incentives must be balanced to ensure that the compensation system operates for maximum efficiency for all parties and maximum protection for victims and that it neither creates new occasions for abuse or inefficiency nor undermines safety incentives brought to bear on manufacturers and sellers.

(4) Full compensation. In addition to considering compensation for the fullest range of traumatic, toxic and long-latency injuries and diseases related to products, the Committee should define compensable loss as broadly as possible. The Committee must recognize that victims' injuries disrupt virtually every aspect of their lives. Compensation should take account of each of the categories of cost injuries and diseases impose on their victims and should recognize that these costs can persist for the lifetime of product victims. Thus, a principled compensation system should provide comprehensive social insurance, covering medical and physical rehabilitation expenses, wage loss, social, psychological and occupational rehabilitation, pain and suffering, impairment of the victim's capacity for life enjoyment in general and impairment of the victim's psychological and physical capacity to perform in specific social and familial roles (e.g. parental, spousal). For at least some of these categories of compensation, victims should be permitted to renew their claims for compensation as new or additional costs arise.

It is incontrovertible that even modest long-term or permanent injuries have pervasive ramifications in the lives of victims. For example, a woman with a lower back injury may have to give up her job as a legal secretary because she cannot sit for 8 hours a day. She may be forced to retain additional domestic or child-care help because she cannot perform certain physical tasks in the household and make innumerable other alterations to her and her family's way of living. All of these represent social and economic costs for which a principled compensation system must account. Moreover, it is counterproductive to ignore the fact that uncompensated costs for virtually every category of disability are ultimately borne by society at large in ways that are substantially less efficient than they could be if they were covered in an appropriate compensation system.

(5) Inclusiveness. Any compensation system should be available to all classes of victims who are recovering for their losses under the current system. In addition, the compensation system should also be available to additional categories of victims, especially including victims of defective products who for purely extrinsic reasons such as special problems of proof or inability to identify or locate the proper defendant would fail to recover in litigation. Victims who themselves share responsibility in some way in accidents involving unsafe or defective products should also be eligible for a compensation system. In short, a compensation system should begin with the premise that virtually any product victim should be eligible and should exclude victims only on narrow, exceptional grounds.

II. THE GORTON AND DODD PROPOSALS

Again, we commend both Senator Gorton and Senator Dodd for offering their proposals, which effectively initiated this essential inquiry into the issues of compensation.

As between the two we are slightly less uncomfortable with Senator Gorton's proposal. It intrudes far less upon current tort law—although we still find its partial curtailment of strict liability doctrine objectionable for reasons of fairness and safety—and its compensation system makes a somewhat closer approach to a truly "no-fault" or "no-controversy" system. Unfortunately, both bills raise the same grave concern over the viability of their respective compensation systems. Both establish triggers or thresholds of obligation which involve concepts of causation and defect or danger. Senator Dodd's compensation scheme includes, in addition, four "defenses" to liability for a manufacturer. As a result, these systems may simply shift the forum of controversy, duplicate the inefficiencies and delays of litigation and unduly exclude victims from compensation.

Both bills would compel victims to make an exclusive choice between litigation and compensation yet neither would provide victims with any access to the most vital information of all at the time such a choice had to be made, namely, the facts that would establish the manufacturer's liability. Moreover, neither bill would offer victims who chose compensation subsequent opportunities to seek noneconomic damages if evidence of negligence or gross misconduct emerged after their choice was made. It is of dubious fairness to force victims to "roll the dice" in electing their remedies. Moreover, this consequent de facto immunity from discovery and liability in large numbers of cases could well erode safety incentives on manufacturers.

Added to this blind choice aspect of both systems is the fact that Senator Dodd's system offers manufacturers ample room for manipulation. Not only does Senator Dodd's system look to manufacturers as the victim's primary source of information about the victim's rights and options during and after the time the victim would choose which remedy to elect, but Senator Dodd's bill would also allow manufacturers to lure, if not lock, victims into compensation simply by "mak[ing] payment" no matter how small the amount. At that point, the victim's only recourse if he or she were not satisfied with the amount would be a binding arbitration system which would not be authorized to award the victim attorneys' fees, but whose costs would be shared by both victim and manufacturer. In these circumstances, the temptation would be great for manufacturers to use the compensation/arbitration system as a device, less costly than, but comparable in effect to, litigation, for coercing victims to accept inadequate settlements during the course of a protracted compensation/arbitration process. In addition, this system could easily be exploited in another way by manufacturers who wished to use affordable, "quick-strike" settlements to shield their questionable design and product practices from the scrutiny of litigation.

Senator Gorton's proposal defuses these problems to a certain extent. A victim's election of remedies would not become binding until the manufacturer's offer was accepted. In addition, a victim who chose to bring a lawsuit would still be able to recover any amounts to which he or she might have been entitled in the compensation system, even if he or she failed to make out his or her case in court. These provisions would render victims somewhat less vulnerable to the manipulative ploys of recalcitrant or malfeasant manufacturers and would come closer to affirming compensation as a priority notwithstanding the victims's choice of remedies.

Both bills, are also objectionable because they take far too narrow a view of compnsable loss. By essentially providing only for medical expenses and wage loss, the compensation system would leave it to the victim to bear the other costs created by defective products, a result that it is neither fair to the victim nor efficient for society at large.

Lastly, Senator Dodd's bill introduces an unacceptable risk, namely, that its compensation system would actually undercut incentives for safety in yet another way. The Senator's proposal provides that as among other sources of compensation, the manufacturer or seller would be the source of last resort. The result would be that the costs of defective products would be imposed primarily on these other sources rather than on those responsible for introducing the defective product into the market place. By thus reducing potential liability of manufacturers, the system might well permit manufacturers to make easier, more certain liability cost projects. This, in turn, would raise the real possibility that the marketing of dangerous products would come to be affordable accordiing to a company's cost-benefit analysis.

CONCLUSION

These criticisms are not intended to suggest our opposition to alternative compensation methods. Rather, they are meant to serve as examples of the kinds of problems a compensation system must overcome if it is to serve the objectives of this committee and of all parties involved. We hope that we can continue to work with the Committee and all others concerned here in finding solutions to those problems.

Thank you again for the opportunity to participate in these hearings and in the larger process of inquiry.

The CHAIRMAN. Thank you, sir.

Ms. Gilbert.

Ms. GILBERT. Thank you, Senator, and members of the committee. My name is Pamela Gilbert. I am a staff attorney for the U.S. Public Interest Research Group. U.S. PIRG is a nonprofit, nonpartisan, consumer, and environmental advocacy group which serves as the national office for State PIRG's across the country.

I greatly appreciate the opportunity to join this panel of representatives of national consumer organizations in testifying here today. We also applaud the efforts of this committee and of Senators Gorton and Dodd in beginning this investigation into the complex and difficult issue of compensation for victims of dangerous and defective products.

Unfortunately, there is no easy solution to the problem of reducing the number of injuries from defective products and of fully and fairly compensating the victims. We believe that the current product liability system in which an injured person may seek full recovery from a manufacturer or seller of a defective product that caused the injury has been the most effective social force influencing manufacturers to produce and market safe products.

However, there is some evidence—and it has been presented both last week and this week at these hearings—that the product liability system is not as effective at giving timely and adequate compensation to victims of defective products.

The proposals of Senators Gorton and Dodd that are being discussed today make important first strides in the process of designing a workable victims' compensation system that will result in a net benefit for the rights of consumers. However, we have a number of concerns with both proposals which I have outlined in my written testimony.

Just to summarize, they can be divided into four major categories. First, the Gorton and Dodd proposals create unnecessary transaction costs by unduly limiting the class of victims that would be eligible to receive benefits under the compensation system.

Second, by preempting State law and by requiring victims to prove negligence in design defect and failure to warn cases, these proposals will reduce the incentives for product safety that the tort system currently provides.

We believe that the Gorton proposal is better in this respect because it does not toy with State tort law quite as much as the Dodd proposal does, and does leave in effect the State tort law standards, except insofar as the amount of recovery for which one is eligible.

Our third point is that both proposals limit recovery under the compensation systems to net economic loss, which would deny full and fair compensation to many victims.

And, fourth, the fact that the victim's decision to enter the compensation system is a binding and exclusive choice will reduce safety incentives and deny full compensation to many claimants.

We believe, first and foremost, that any victims' compensation scheme in which there is a tradeoff of the right to sue for full recovery in return for the ability to receive swift but limited compensation must be a truly simple process that does not recreate the transaction costs of the current tort system.

The Dodd and Gorton proposals, as presently drafted, do not meet this basic prerequisite, and therefore we feel they fall short of the twin goals of providing incentives for product safety and providing adequate compensation to the unfortunate victims of those products.

The concerns and unknowns that have been raised regarding these proposals indicate that it may be premature to attempt to design a comprehensive compensation system that will improve the situation of all consumers in relation to all product-related injuries. Perhaps a more workable approach would be to begin by addressing a narrower class of victims whose needs are not being met by current product liability law.

For example, many people who suffer from long latency diseases they have developed as a result of exposure to toxic substances have been unable to receive compensation through product liability lawsuits because of the difficulty of proving causation. These victims, many of whom suffer from severe or fatal illnesses, would probably benefit greatly from the opportunity to choose a system that assures compensation but provides a limitation on the amount of each award.

Finally, I would like to make a point about some of the comments that I heard earlier this morning about reserving the tort system solely for intentional or criminal conduct on the part of a manufacturer. This poses a grave concern to us when we look at the history of some of the infamous product cases, such as the Dalkon shield cases and the asbestos cases, and our fear that if the lawsuits around those cases had not been brought, the public awareness about the dangers of those products and the recalls that the liability lawsuits have produced would not have happened.

There would have been more unsafe products on the market today, and less awareness about their dangers or the ability to guard against them had those lawsuits not been brought.

I want to repeat that U.S. PIRG very much appreciates this opportunity to be here today and we would like to continue to participate in this very important dialog about the issue of victims' compensation.

Thank you.

[The statement follows:]

STATEMENT OF PAMELA GILBERT, U.S. PUBLIC INTEREST RESEARCH GROUP

Mr. Chairman and members of the Committee, my name is Pamela Gilbert. I am a staff attorney for the U.S. Public Interest Research Group (U.S. PIRG). U.S. PIRG is a nonprofit, nonpartisan consumer and environmental advocacy group which serves as the national office for state PIRGs across the country. I greatly appreciate the opportunity to join this panel of representatives of national consumer organizations in testifying here today.

We applaud the efforts of this Committee and of Senators Gorton and Dodd in beginning this investigation into the complex and difficult issue of compensation for victims of dangerous or defective products. The sheer numbers of people who are injured by products every year make this an important issue for Congress to address. According to a recent study by the National Academy of Sciences for the Department of Transportation, in 1983, 143,000 people died and 70 million required medical care or had to restrict their activity as a result of injuries. A large percentage of these were related to products.

Unforunately, there is no easy solution to the problems of reducing the number of injuries from defective products and of fully and fairly compensating the victims. The current product liability system, in which an injured person may seek full recovery from a manufacturer or seller of a defective product that caused the injury, has been the most effective force influencing manufacturers to produce and market safe products. A recent study by the Rand Corporation entitled Designing Safer Products: Corporate Responses to Product Liability Law and Regulation (1983) found that "of all the various external social pressures influencing product design decisions, product liability seems to be the most fundamental. The other influences largely work through a product liability activity." The Rand Study also noted that the prevailing standard of strict liability has greatly contributed to these incentives for product safety.

However, there is some evidence that the product liability system is not as effective at giving timely and adequate compensation to victims of defective products. For example, according to the Insurance Services Office's Product Liability Closed Claim Survey: A Technical Analysis of Survey Results which analyzed closed product liability claims from 1976–1977, over one-quarter of the claimants received payments less than their economic loss. More than one-half of these people received no payment at all, although their average economic loss was $15,464. Furthermore, in many cases where injured persons had incurred large out-of-pocket expenses, there was as much as a five year delay before they received the first payments of their product liability awards.

Senators Gorton and Dodd each have proposed a plan which attempts to compensate more victims of product injuries, and to do it more quickly than the current system. These proposals make important first strides in the process of designing a workable victims' compensation system that will reuslt in a net benefit for the rights of consumers. However, we have a number of concerns with both proposals, some of which I would like to share with the Committee.

I. CLAIMANT POOL

One of the most difficult issues in designing a victims' compensation plan is the question of which claimants should be eligible to receive benefits. Surprisingly, I find myself agreeing with the opinion of Mr. Michael Mullen of the Product Liability Alliance that the Gorton and Dodd proposals send conflicting messages regarding the answer to this question. On the one hand, both plans are supposed to minimize transaction costs by minimizing, or eliminating, the number of issues that can be contested by the parties. On the other hand, both plans seek to keep many product-related injuries out of the compensation system, which increases the opportunities for disagreement among the parties.

For example, Senator Dodd's plan establishes four defenses for manufacturers based on the conduct of the victim, and in Senator Gorton's scheme, the victim must make a showing that the product is "unreasonably dangerous" before he or she may receive compensation benefits. With the inclusion of these defenses to liability, these "no-fault" compensation systems begin to resemble the fault-oriented tort system, recreating many of the transaction costs and inefficiencies that the new systems were designed to eliminate. This defeats the trade-off in the proposed schemes of the opportunity for unlimited damages in the courts in return for a quick and easy system of compensation, putting the claimants who can least afford the added delay and expense in a "lose-lose" situation.

II. EXCLUSIVE AND BINDING CHOICE OF REMEDY

Another problem that is shared by the Gorton and Dodd proposals is the fact that the victim's decision to enter the compensation system or to sue in tort is an exclusive choice. This denies a victim the opportunity to sue the manufacturer for noneconomic damages some time in the future if evidence becomes available that the manufacturer acted negligently or willfully in designing the defective product. Allowing some malfeasant businesses to escape full tort liability because the information about their conduct was unavailable before discovery would reduce the deterrent effects of the product liability system, to the detriment of all consumers.

The fact that choice of remedy is exclusive and binding imposes a particular hardship on consumers under Senator Dodd's proposal since the compensation benefits in his plan do not include attorneys' fees, and therefore, most victims who choose to enter his compensation system will make this decision without the assistance of counsel. Furthermore, these claimants will be bound by their choice as soon as the manufacturer or seller tenders any money in payment for the claim.

Under this scheme, the manufacturer or seller can lock the claimant into the compensation system by offering a small amount of money as payment for damages. If the claimant challenges the amount, the case is thrown into binding arbitration, the cost of which is shared by the parties. What is more, there is no provision in the proposal for the arbitration award to include attorneys' fees and expenses.

It is quite conceivable, then, that a victim may end up paying more money to pursue a claim under Mr. Dodd's compensation system than he or she would be awarded in damages under that system. This puts the claimant at an extreme disadvantage in any settlement negotiations that would follow the manufacturer's tender of payment. This compensation plan would enable many manufacturers to settle with the victims of their products for very small sums, reducing the incentives for manufacturing safe products and leaving the victims with less than full compensation.

III. INCENTIVES FOR PRODUCT SAFETY

A third problem which is of grave concern to consumers is ensuring that the Gorton and Dodd proposals do not reduce the incentives for product safety that the tort system with its strict liability standard currently provides. Both plans would preempt state law by requiring a claimant in design defect and failure to warn product liability lawsuits to prove that the manufacturer or seller was negligent in order to receive compensation for noneconomic loss. These provisions are designed to channel most claims into the compensation system, and reserve the tort system for those cases where the manufacturer was truly "at fault."

In addition to being overly intrusive into state law, this scheme poses a great danger that many cases in which a manufacturer was negligent or reckless would not reach the tort system, thereby significantly reducing the disincentives for engaging in that type of behavior.

As I explained earlier, under the Dodd plan, a person who is injured by a product must choose which system to enter, often without the benefit of counsel and without any opportunity for discovery to find out if the manufacturer might have been at fault. If the claimant enters the compensation system, he or she is bound by that choice as soon as the manufacturer tenders any payment, even if the claimant chooses not to accept that payment. Therefore, the more guilty the manufacturer, the more likely the manufacturer will be to offer compensation and avoid the risk of a large damage award and the public exposure of their conduct that a lawsuit would present.

The Dodd scheme further discourages lawsuits by providing that a victim who brings a suit and does not meet the burden of proving negligence will be left with no compensation from the manufacturer. This virtually forces victims, especially those with large losses and inadequate insurance to enter the compensation system in all cases but those where the manufacturer's fault is absolutely clear. What is more, the instances in which the victim will be sure that the manufacturer acted negligently will be extremely rare since there is no opportunity to investigate the conduct of the manufacturer through a discovery process before electing a remedy.

If this had been the law for the past 25 years, we might still not know of the gross misconduct of the A.H. Robins Company in manufacturing and marketing the Dalkon Shield, or of the asbestos manufacturers in failing to warn and protect against the poisonous nature of that substance. The public awareness that the lawsuits over these products engendered, both in terms of informing people to guard against the products' dangers and of deterring similar conduct by other manufacturers, might never have occurred if the responsible companies were able to pay off the victims of these products through a quiet, hassle-free compensation system.

Senator Gorton's proposal improves upon Senator Dodd's model in two important respects. First, the claimant is not frozen into the compensation system until payment by the manufacturer is agreed to by both parties. A negligent manufacturer thus unable to avoid a lawsuit by quick tender of payment to the injured person. Second, if a claimant chooses to sue the manufacturer but is unable to successfully meet the burden of proving fault, the court may nevertheless award to the claimant the benefits that would have been received under the compensation scheme. This provision would allow victims with colorable, but uncertain, negligence claims to bring lawsuits against the manufacturer, without the attendant risk of receiving no compensation at all.

IV. LIMITATION OF DAMAGES

The final problem that I will address is the limitation of damages to "economic loss" in the compensation systems of both proposals. With some variation, the plans define "economic loss" as medical expenses and lost wages. There is no provision for payment for the loss of enjoyment of life in cases of permanent or devastating injuries, or where the injured person has adequate medical insurance and has not missed many days of work.

For example, a DES daughter whose young adulthood consisted of being in and out of hospitals, with operations for vaginal cancer that have left her unable to have children and in constant fear of having the cancer reappear, may have very small "economic losses," consisting only of the portion of her medical expenses that were not covered by insurance. Full and fair compensation for her injuries must include damages for the devastation of much of her childhood, the permanent loss of the chance to be a mother, and the constant anxiety that she may develop cancer again.

Workers' compensation, which is similar in many respects to the victims' compensation proposals at hand, awards damages over economic loss for permanent disabilities, such as disfigurement or the loss of a limb. This scheme recognizes that many victims of severe or permanent injuries have a need to be compensated for their intangible, but real, suffering and loss. These people often use the money to ease the burden of living with their injuries by modifying their lifestyles or environments to accommodate their disabling conditions. For example, payments above lost wages and medical costs can enable a victim to purchase an automobile with special features, redesign the interior of a home, move to more accessible surroundings, or obtain special training.

In conclusion, I would like to repeat that we feel that the Gorton and Dodd victims' compensation proposals represents an important first step in the process toward developing a system that will provide both full and fair compensation for victims of defective products and strong incentives for the production of safe products.

However, the many concerns and unknowns about this issue that have been raised before the Committee indicate that it is premature to attempt to design a comprehensive compensation system that will improve the situation of all consumers in relation to product-related injuries. Perhaps a more workable approach would be to begin by addressing a narrower class of victims whose needs are not being met by current product liability law.

For example, many people who suffer from long latency diseases that they developed as a result of exposure to toxic substances have been unable to receive compensation through product liability lawsuits because of the difficulty of proving causation. These victims, many of whom suffer from severe or fatal illnesses, would probably benefit greatly from the opportunity to choose a system that assures compensation but provides a limitation on the amount of each award.

Whether the Committee adopts this approach or continues to discuss a more comprehensive reform, U.S. PIRG would very much like to continue to participate in the dialogue about the issue of victims' compensation.

Thank you again for the opportunity to appear before you today.

Senator **Kasten**. Senator Danforth.

The **Chairman**. Is anyone satisfied with the present state of affairs?

Mr. **Kimmelman**. Senator Danforth, I don't think anyone is at all. Our concern, though, is finding out precisely what the problems are of particular classes of people. We have anecdotal evidence; we are looking for something a little bit more systematic to get at what the real problems are of recovering for injuries under the current system.

The **Chairman**. Well, the problem is, cases go on forever and lawyers get rich.

Ms. **Lipsen**. Right; and we would not want to replace it with a system that did the same thing.

The **Chairman**. Yes; but I mean when Professor Calabresi says that—the first point he made: Something ought to be done. I mean that is very clearly stated.

Do you agree with that? Do you feel a sense of urgency that something ought to be done? Or do you think we should just sort of file these proceedings in a very large bin somewhere.

Mr. **Kimmelman**. I think we do feel a sense of urgency. I think we have been promoting the idea of looking at compensation for quite a while, and we are happy to see that it is being looked at now, but we don't claim to have all the answers either.

We know there are problems. We are trying to find out, systematically, what they are from a consumer perspective.

The **Chairman**. I understand. But do you think that we should do something?

Mr. **Kimmelman**. Well, I am interested in the proposals that Professor O'Connell made because I think, in many respects, what you heard this morning from legal scholars demonstrates the great disagreement about what the current system does and what alternatives would do.

I think what is intriguing about Professor O'Connell's approach is that in some respects, a lot of it could be done through private agreements, as is done in the case of football helmets.

And I think it is an interesting approach since we don't know precisely what the incentives are in a compensation system, or how they would work. I would be fearful that we may lock ourselves into a compensation system before we understand how it will work.

The **Chairman**. Maybe we should try a new approach for some specific product line. Does that make sense?

Mr. **Kimmelman**. I think in many areas it would make sense. We have already outlined problems with occupational diseases, problems with long latency diseases in general. It is quite clear that the tort system is not adequately dealing with these problems.

Mr. **Nishimura**. Senator.

The **Chairman**. Mr. Nishimura.

Mr. **Nishimura**. Senator, I think that too often when we talk about whether or not something needs to be done or whether or not there ought to be a national uniform law, we talk about those States where consumers would possibly get less, because of Federal legislation overriding.

I think there are clearly issues like statute of limitation and issues like contributory negligence, where consumers in some States would benefit from this type of application. But our organization is not interested in legislation just for uniformity sake. As a matter of fact, we opposed S. 44 as well as S. 100 on the basis that they were merely tinkering with the tort system and really did not address any of the issues we thought were important.

They were merely tinkering with the tort system. We think that, addressing your question whether or not it is an emergency or whether or not something should be done, we think the opportunity for all sides to start moving toward an answer that is beneficial to injured consumers is an opportunity that should not be missed, and that is why we are participating.

The **Chairman**. Do you all feel that you, as representatives of consumers and consumer groups, can work with the business community toward something that is reasonably acceptable to all? Or do you view yourselves as just being in an adversarial position with no room for working together?

I mean my assumption has been that there has to be some meeting of the minds between the business community and consumer groups if we are going to have meaningful reform in this area.

Is that wishful thinking, do you think?

Ms. **Lipsen**. There was a lot of contentiousness between the manufacturers and consumer groups over the discussions of S. 100 as is well known.

However, we look at this as a new ball game, if you would excuse the sports analogy. However——

The CHAIRMAN. Are the pitchers throwing at the batters' heads yet?

Ms. LIPSEN. I will stop there. My knowledge of sports is not very extensive. But as you know, we are participating in a working group and so far, although we have not—so far we feel that we can work together.

The CHAIRMAN. Good; unless you do, we are just sunk I think. I mean I really would hope that everybody would work toward a common cause, if you will excuse the pun, and try to come up with something that is reasonably acceptable. I mean you have heard the testimony of Mr. Jenkins from Chicago, who is at his wit's end. I mean he is just at his wit's end.

And I would hope that there would be something that would provide him some greater certainty. I mean it is ridiculous if he has to say to his employees, 133 employees, members of an ESOP program, sell your stock, or we are going to have to start making machines in Korea. There is no future in this.

I mean that is truly a ridiculous situation. On the other hand, it is a ridiculous situation if businesses or any defendant can keep a case from being adjudicated for a prolonged period of time.

So my hope would be that we could all get behind this common effort and produce something that is worthwhile.

Thank you, Mr. Chairman.

Senator KASTEN. I would just like to ask each of you from your point of view, the transactional costs of this whole process are clearly inefficient, with disproportionate dollars going to the legal process on one side or the other as opposed to the people, to the injured consumers.

Now, that disproportionate cost is passed on to other consumers, not the ones that are injured, but the other people in the community who are paying for the products.

Could you just very briefly characterize your point of view in terms of the transactional cost and particularly the legal cost? Do you think the legal costs in this area of the law are too high and that that needs to be changed? I am not saying get rid of different kinds of compensation systems for trial lawyers.

But aren't you concerned about the legal costs in this process? And we will just start with Mr. Kimmelman and go across.

Mr. KIMMELMAN. Absolutely, Senator Kasten. We have very strong concerns about that. We are most interested in the money going to people who really need it, people who have been injured. But it is a complicated problem from our perspective. To the extent that we are looking at a compensation scheme, we want it to be as simple as possible, please don't litigate any of those issues. It should work like an insurance scheme. The less litigation the better.

When we are talking about the tort system, though, there are obvious problems because if you have standards of behavior on both sides that you want people to measure up to, and you want incentives to make sure that people act in a reasonable fashion, we are going to have a lot of litigation. We do not know of another way of dealing with those kinds of problems other than going into court and fighting it out.

If there were another way of doing it we would be the first to jump on board. But as far as we know, there is no other alternative, other than possibly trying to shift a lot of cases to a quicker payment scheme, which is why we are interested in a compensation idea.

Ms. **Lipsen**. I would like to associate myself with the remarks of Mr. Kimmelman. Yes, we also think the transaction costs are too high and would be reduced if a compensation scheme truly eliminated the scope of issues presented.

Mr. **Nishimura**. We obviously think the transaction costs are one of the major issues. But let me move a little back. When Gene first started talking, he said there are 30 million accidents in this country, and when we talk about product liability cases, we are talking about tens of thousands. And between the tens of thousands that is the reality of cases that go to court and the 30 million accidents, there are a lot of people that are falling in the cracks and not getting compensated.

I think, aside from being a legal reform organization, we are interested in seeing that injured consumers get compensated quickly and without undue delay.

I think transaction cost is a measure of the undue delay that occurs when consumers make it into the system, but let's not forget the hardships that occur when they don't make it into the system.

Ms. **Gilbert**. Like my colleagues, we very much believe that transaction costs are a major problem with the system. However, we did not support S. 100 because we did not feel and do not feel that changes in substantive tort law are going to cut down on these transactions costs. And we still do not believe that. That is why we are here today, to discuss a new route, a compensation system which could cut down on transaction costs, distribute the money in the system more equitably and compensate more victims.

However, we have grave concerns that whatever compensation system we come up with does cut down on transaction costs by significantly reducing the elements of possible disagreement between the parties.

Mr. **Goffman**. One of the things that animates us as far as getting together with Senator Danforth's working group is the fact that we think a true, simple compensation system would cut down on transactions costs.

I think one of the reasons that we share some of Senator Danforth's hope that there can ultimately be a meeting of the minds here is that the elimination of transactions costs is an incentive that works on parties on both sides of the issue at this point. So there is no doubt that that is one of our prime concerns.

But at the same time, for that very reason, our sense of an adequate compensation system is going to be viewed according to a very high threshold: simplicity and efficiency.

Senator **Kasten**. Well, I thank you all for that answer because if we are going to be successful in working toward where we are going, it is important that you, as consumer groups, are number one participants in the group. But it is also important, I think it is critical that you not be viewed as fronting for the trial lawyers, if you will, but as a group of people who have legitimate interests on behalf of consumers. And you are entering these negotiations on that basis.

I am still hopeful that we are going to be able to make some strides within the bar association. We are working on some—I mean there is a split within the Bar Association, and one group of attorneys is unwilling to work with us, but a broader group of attorneys, frankly, is willing to work with us.

And I think that if we can continue to work in reasonable ways to go forward, I think that there is a chance that we can come to a meeting of the minds and we can deal with what I think all of us recognize as a very, very serious problem.

The other aspect of this, and I may submit some questions for the record on this, but I know that all of you are concerned from the consumer point of view about the kind of a problem that now has presented itself with the measles vaccine. That is a significant problem, and I do not know if we are going to be able to figure out a way to deal with it. But clearly we want to be able to have a vaccine like that on the market.

And we also recognize that unfortunately one in every whatever the number, 10 million or whatever, possibly are going to cause a problem, but we as a society have to come together and deal with that problem. And the answer to it is not to put everybody making the measles vaccine out of business. And these are the kinds of issues that I think that we can work together on and for which we can work to find a solution.

So there will be other questions that we intend to submit for the record.

I thank you very much for your testimony today.

Our next panel is Mr. Chanzis, Mr. Schreiber, and Mr. Hunter.

The committee will come to order.

Our first witness on this panel is Mr. Norman Chanzis who is director of Risk Management, American Standard, Inc.

Mr. Chanzis.

STATEMENTS OF NORMAN B. CHANZIS, DIRECTOR OF RISK MANAGEMENT, AMERICAN STANDARD, INC., AND CHAIRMAN, GOVERNMENTAL AFFAIRS, RISK AND INSURANCE MANAGEMENT SOCIETY, ACCOMPANIED BY JON HARKAVY, DIRECTOR, GOVERNMENTAL AFFAIRS; SOL SCHREIBER, ADJUNCT PROFESSOR, FORDHAM LAW SCHOOL; AND J. ROBERT HUNTER, PRESIDENT, NATIONAL INSURANCE CONSUMER ORGANIZATION

Mr. CHANZIS. Thank you, Senator Kasten. I am director of risk management, for American Standard, Inc., a more exotic name for a manager of insurance, and I also am here on behalf of the Risk and Insurance Management Society.

I offer you a mixed bag today in terms of the fact that I am probably the third nonlawyer to appear, a part time academician, and the first full time insurance man to offer testimony today.

The organization I represent, RIMS, is a nonprofit trade organization representing corporate, governmental and institutional buyers of commercial insurance in 76 chapters throughout the United States and Canada. Although RIMS represents over 90 percent of the Fortune 500 list, our 3,800 members and 7,200 deputy members include many small buyers of commercial insurance as well.

Before proceeding, a brief note, if I may. Let me first say that on behalf of the manufacturers represented here today, I resent the comments when I hear that there may be a reduced incentive for manufacturers to put out safe products. I think in those product liability actions where a manufacturer or its insurer have been forced to pay claims or make settlements, in by far the larger percentage of cases, if there is a defect, and granting that there may be, that defect is certainly not representative of a manufacturer who deliberately or even sloppily is turning out an unsafe product.

I would like to offer a single horror story as a basis for my testimony, an alarming development from our viewpoint. In recent months we as a building products supplier have been named as a defendant in two major hotel fires on the theory that our cast iron bathtubs contributed to or enhanced the fires. In one case expenses now exceed $250,000, and since we are part of a large package of suppliers, we all have been asked to contribute. If we refuse, we have been threatened with the possibility of standing alone to defend this particular action.

We certainly do not deny the rights of injured persons to compensation, but as these decisions mount, so does the pressure on us risk managers and our companies, resulting from the manyfold increases in product liability insurance premiums, accompanied by reduced limits of coverage, and in some cases, the total inability to procure this needed insurance.

In my particular situation we have seen an 80 percent increase in premiums over the last 2 years, and we anticipate nearly double that percentage at our next renewal.

Given all of the above, and facing the continuous vagaries of the State decisions which have been foisted on us in many cases, we have strongly supported S. 100 and would consider alternatives if such legislation would incorporate needed reforms, most importantly, in our view, the establishment of uniform federal standards.

While there is much we favor in Senator Gorton's measure, we must regrettably reject it because it lacks this provision. Although Senator Dodd's proposal embodies this feature, we are concerned that the lower standard of proof prescribed under the so-called no-fault mechanism may be assessed without regard to causation. In effect, the mere filing of a claim could be tantamount to recovery.

Further, we can foresee a flood of nuisance type claims under Senator Dodd's amendment without a better definition of the term "bodily harm" in section 1034(a). Picture if you will the reaction of our insurance underwriters to a frequency of claims in this respect.

We do agree that a system which speeds recovery while limiting transaction costs is surely desirable, but the Dodd victims compensation scheme should provide for benefits while maintaining and not lowering the standard of proof upon which recovery is based. In return, if a manufacturer is strictly liable for a physically defective product or negligent in its improper design, then he should reimburse the victim in full—and this is my personal feeling, perhaps not that of my organization—all within the confines of Senator Dodd's claims mechanism. In effect, a system of binding arbitration both as to causation and award can be developed.

This tracks, I think, with Professor O'Connell's system, and 5 years ago he and I worked together in trying to develop some no-fault alternatives at that particular time.

As an add-on, a scheduled award system, similar to automobile reparations or workers' compensation, perhaps somewhere—and we have not thought this out fully—between pure economic loss and pain and suffering could be included. We think this is workable.

Actually, in Senator Dodd's own words, "the problem is the lawsuit itself." Each day the insurance industry questions whether a manufacturer is insurable under the present tort law system, and unless meaningful reform is accomplished soon, the answer to that question will surely be no.

I would like to conclude by noting a few facts if I may to the committee in connection with the current insurance situation. The insurance industry is now actively considering restrictions in coverage through the impositions of a new type of what they call a claims-made policy, and more important, the inclusion of defense costs within the primary limit of insurance. At this time defense costs are separate.

If you will take the case of the bathtub that I alluded to above, as we have already expended $250,000 in defense costs, if you will, and our limit of liability is $300,000, we only have $50,000 left with which to satisfy a judgment or a settlement. We think this is wrong, and of course, if it does come to pass—and right now it looks as though it is going to be imposed on us—then we have additional problems in addition to the inordinately high premiums which we now face.

Thank you very much.

[The prepared statements follow:]

STATEMENT OF NORMAN B. CHANZIS, DIRECTOR, RISK MANAGEMENT FOR AMERICAN STANDARD, INC.

Good morning. My name is Norman B. Chanzis, Director of Risk Management for American Standard, Inc., whose views I am presenting here today. Additionally, I am testifying on behalf of the Risk and Insurance Management Society, known as RIMS, whose Governmental Affairs Committee I chair. RIMS is a non-profit trade association, representing corporate, governmental and institutional buyers of commercial insurance in 76 Chapters throughout the United States and Canada. Although RIMS represents over 90% of the Fortune 500 list, our 3,800 members and 7,200 deputy members include many smaller buyers of commercial insurance.

Before proceeding to the heart of my testimony, let me first state for the record my resentment at a number of comments which had been made this morning in terms of a manufacturer's incentive to produce a safe product. The allegations seem to infer that in general, most manufacturers need incentives in this respect. While accidents do happen and claims arise from unsafe products, the implications that we have little concern to turn out a safe product are just not true.

I would now like to offer the Committee one more "horror story," which will serve to highlight our testimony with respect to the Dodd and Gorton amendments. In recent months, we have been named as a defendant in two major hotel fires on the theory that our cast iron bathtubs contributed to or enhanced the fires.

In one case, expenses now exceed $250,000 and we have no way of removing ourself unless we agree to contribute with a number of other "lower tier" suppliers at about the $200,000 level each. The impact of this approach will be seen later.

While we do not deny the rights of injured persons to just compensation, please appreciate that as these cases mount, so does the pressure on risk managers, resulting from the many fold increases in product liability premiums, accompanied by reduced limits of coverage and, in some cases, the total inability to procure this needed insurance. To further worsen the situation, the insurance industry is attempting to implement restrictions in Liability Insurance coverage through the imposition of a "claims made" policy form and inclusion of defense costs WITHIN the primary limit of the policy. Presently, such costs are separate from the aggregate limit. In the bathtub case cited above, if we had a $300,000 policy, only $50,000 of insurance would be available to indemnify a claimant since $250,000 has already been used for expenses. In fact, if the case continues at its present pace, we may well have no coverage available for the injured parties. To give you a better appreciation of our problems in this area, we attach a copy of RIMS' testimony presented last month to the New York State Insurance Department.

Given all the above and continuing to face the vagaries of State decisions, we have strongly supported S. 100 and would consider alternatives, if such legislation would incorporate needed reforms; most important of which would be the establishment of uniform Federal standards. We must therefore regrettably reject Senator Gorton's proposal because it lacks this provision, although there is much we favor from a conceptual basis.

Although Senator Dodd's amendment does embody Federal standards, we are concerned that the lower standard of proof prescribed under the "no-fault" mechanism may be assessed without regard to causation. In effect, the mere filing of a claim could be tantamount to recovery. Further, we can foresee a flood of nuisance type claims under Senator Dodd's amendment without better definition of the term "bodily harm" in Section 103(4)(A). Picture if you will the reaction of insurance underwriters to a frequency of claims in these areas.

We do agree that a system which speeds recovery while limiting transaction costs is most desirable, but the Dodd "victims compensation" scheme should provide for increased benefits, while maintaining—not lowering—the standard of proof upon which recovery is based. In return, if a manufacturer is found to be strictly liable for a physically defective product, or negligent for its' improper design, then he should reimburse the victim in full—but all within Senator Dodd's "claims" mechanism. RIMS advocates increased benefits under the victim's compensation mechanism established in the Dodd proposal because we wish to provide a greater incentive for the injured claimant to utilize a system free of the huge transaction costs associated with litigation. RIMS opposes any lowering of the standard of proof in such a victim's compensation mechanism because it would create a two tiered system in which the stronger cases will still go through the litigation process while weak or spurious claims would be funneled through a mechanism where the mere filing of a claim may be tantamount to recovery. Moreover, since liability can be assessed under the Dodd victim's compensation mechanism without proof that the defendant manufactured the product is responsible for the injury, it is likely that the manufacturer with the perceived deepest pocket will be the target of choice for these no fault cllaims. In short, the benefits of the tort reform aspects of the Dodd proposal would be far outweighed by the huge amounts of unfunded liability that would be created under this no fault mechanism. It is my personal belief that a system of binding arbitration, both as to causation and award, can be developed. Perhaps an add-on would also be in order to provide scheduled awards similar to the Workers' Compensation and automobile no-fault system.

There is one further aspect of the Dodd proposal which disturbs us, and I would again like to cite the bathtub situation as an example of our uncertainty. The question is whether a claimant would be able to file first against American-Standard under non-fault, while proceeding against the primary wrong-doer—the hotel—in tort? If so, would we not, to use Senator Dodd's analogy, be financing the plaintiff's chance to hit the jackpot in the Lottery system of tort? Again, to use Senator Dodd's own appraisal: "The problem is the lawsuit itself."

Each day in a risk manager's existence, we hear the insurance industry question whether a manufacturer is unsurable under the persent tort system and unless meaningful reform is accomplished soon, the answer to that question will surely be, No!!!

Thank you for the opportunity to address this Committee, and we will be pleased to offer additional input as you struggle to come up with a workable solution.

STATEMENT OF JON HARKAVY, DIRECTOR, GOVERNMENTAL AFFAIRS, RISK AND INSURANCE MANAGEMENT SOCIETY, INC. (RIMS)

Good morning, my name is Jon Harkavy, director of governmental affairs and I am testifying today on behalf of the Risk and Insurance Management Society, commonly known as RIMS. Testifying with me today on some of the specific questions that were raised by the New York State Insurance Department on the new ISO

CGL formats is William Blick, risk manager of the Allen Group, a Long Island based RIMS member company. Mr. Blick was RIMS' chief liaison to the insurance services office (ISO) in its drafting of the new policy formats.

RIMS is a non profit organization comprised of 3,600 corporate governmental, and institutional buyers of insurance in 76 chapters throughout the United States and Canada. Our three New York chapters represent more than 300 of the largest corporations, non profit institutions and governmental entities in the State. While RIMS membership includes more the 92% of the Fortune 500, our constituency encompasses many medium and smaller size organizations as well. The comments which we will present today reflect the interests of not just the large insured, but indeed, every policyholder and potential purchaser of commercial insurance.

At the outset, RIMS would like to express its appreciation to the insurance services office for eliciting our comments during the drafting of the new CGL formats. The society's participation in this drafting process, however, does not translate into approval and/or acceptance of the new CGL formats and particularly, the "claims made" approach. RIMS believes that these new formats, and the manner and speed under which they are to be implemented, will have a devastating impact on policyholders and potential claimants. Unfortunately it will be the New York Insurance Department which will bear the burden of explaining to uninformed policyholders or unindemnified claimants why they were not insured or indemnified under the proposed CGL claims made policy.

I. OVERVIEW OF THE NEW CGL

RIMS respectfully submits that the new CGL formats represent an abuse of the anti-trust exemption granted to insurers by the McCarran Ferguson Act. The rationale behind this anti-trust exemption is that certain collective efforts by insurance carriers will best serve the needs of policyholders and the general public. Despite ISO's allegation that these steps are necessary to assure solvency and capacity in the marketplace, the new ISO CGL formats serve only the interests of the insurer, with little or no concern as to the impact that these changes will have on the insured, or potential claimants.

The society stresses that our criticism of the new CGL is not a "sour grapes" reaction to the hard insurance market. As purchasers of insurance we look wistfully back at the recently past soft insurance market, but fully understand the fact that the "ride" could not last forever. The newly proposed "claims made" CGL however, does not represent a move back to sound underwriting or pricing practices. Rather, it represents a conscious decision on the part of insurers not to offer coverages needed by the buying public. RIMS is not arguing the need for premium hikes, although the interests of stability are not well served by 600% or more increases on certain lines. The society would understand an insurer's reaction if they lower policy indemnification limits; at least the policyholder could seek excess and umbrella coverages. The new CGL claims made format however, represents for the buyer a change in the scope of coverage; a substitute of uncertainty for certainty—precisely the opposite of what insurance is intended to offer. As consumers of insurance we would rather pay more for a reduced level of defined and necessary coverage than to receive protection under a policy which is illusory at worse and uncertain at best.

II. PROPOSED CLAIMS MADE FORM

Sound underwriting practice is an insurance function calling for selective assumption of risk at adequate premium levels. When selectivity creates canyon size gaps in needed coverage, it ceases to be sound underwriting or insurance. This non-insurance approach was taken by ISO in its "claims made" format. Under the claims made form, coverage is triggered when a claim for bodily injury or property damage is made in writing. The drafting of the new claims made policy was the direct result of problems which insurers have faced from litigation arising out of the coverage of asbestos, des, radiation, agent orange, and other long tail risks. There are those insurers who contend that coverage on a claims made basis may alleviate many of their problems. They may be right; however the burden will be passed back to the insurance buyer, including Government agencies and municipalities. If, as ISO contends, the problem lies with 5% of the policies written, why deprive the other 95% of coverage?

III. EXTENDED REPORTING PERIOD UNDER ISO'S CLAIMS MADE FORM

Under the new CGL claims made policy, claims made in writing more than 60 days after the policy expiration will not be indemnified. To avoid gaps in primary coverage if either the insurer or buyer cancels or refuses to renew a claims made policy, the buyer has a right to purchase an unlimited extended reporting period or "tail". The maximum premium for the tail coverage is 200% of the premium for the final policy year.

In practice, this extended reporting provision may not be an option, but rather legalized blackmail! Given the frequent lag time between the event and the filing of a claim, most prudent buyers of insurance want and need liability coverage for claims occurring during the policy period that may be filed after a policy's expiration date. Unless the buyer renews his claims made coverage with his original insurer, he will be compelled to purchase tail coverage at up to 200% additional cost. If the buyer is cancelled by his insurer, or seeks coverage from another insurer, a 200% "severance fee" into the pocket of the original insurer may very well become a pro forma part of this type of transaction. RIMS respectfully requests the department to consider the economic leverage this arrangement gives the original insurance carrier to increase its initial premium rates at policy renewal. A premium renewal quote which is for example, 30% higher than other competitive bids, may have to be accepted by the policyholder because switching insurers necessitates the purchase of tail coverage for up to 200% of the premium for the final policy year.

Moreover, what can happen under the CGL claims made form when a loss does occur? Suppose a smaller commercial insured, a theatre owner for example, suffers a fire ten months into his policy term and his carrier does not renew his coverage. Even given the efficiency of the plaintiff's bar, many claims may not be filed until four or more months later. The policyholder, will of course be obligated to purchase tail coverage at up to 200% of premium, to have protection for late filed claims. Since coverage is triggered when the claim is filed rather than when the loss is reported, the insurer could cancel the policy as soon as the insured notifies the carrier of the fire. Thus the 200% option may come into play even if claims were filed within the original policy period.

IV. INCREASED POTENTIAL FOR POLICYHOLDER/CARRIER DISPUTES UNDER NEW CLAIMS MADE FORM

All of which brings into consideration the impact which the formats have on insurer/policyholder relations. Does the policyholder violate policy provisions and forego notifying the insurer of a potential loss until a claim is filed so as to try to protect himself from possible cancellation by the carrier, and the ensuing obligation to purchase tail coverage? Perhaps an even more anomalous result of the claims made policy is that it encourages the insured to solicit the timely filing of claims against itself or its insurer in order to guarantee indemnification. It is not inconceivable that one will see notices in newspapers and legal publications placed by insureds stating something like "All potential claimants against the Embassy Theatre should file suit prior to February 1, 1986 if they wish to be assured that the defendant has policy coverage". Such a situation will only exacerbate the already high level of insurer/policyholder litigation which is clogging our present civil justice system.

V. CERTIFICATES OF INSURANCE UNDER A CLAIMS MADE POLICY

Policyholders however may not be the only ones made vulnerable under a claims made policy. Anyone from a purchase of a septic tank to a municipality often rely on certificates of insurance as proof of the financial responsibility of the vendor should a future occur. Governmental entities, as large buyers of goods and services particularly rely on such certificates of insurance. Certificates of Insurance for claims made coverage may not be worth the paper they are written on. If the certificate does not state that tail coverage has been purchased, or that the claims made policy will be perpetually renewed, the certificate holder may be deluded into relying on non existent protection.

VI. REPLACEMENT OF OCCURRENCE LIMITS WITH AGGREGATE LIMITS UNDER THE NEW CGL

A most crucial element of ISO's new CGL policy is the replacement of occurrence limits with aggregate limits. The existing per occurrence limit is well suited to provide coverage over the course of the policy period. Given the lower aggregate limits in the new CGL, it is more likely that coverage can terminate through exhaustion of limits prior to the expiration date of the policy. Yet no provision in the new CGL is made for reinstatement of limits if the aggregate is exhasuted during the policy period.

In the case of the new CGL claims made policy, ISO has not provided for a reduction in the purchase price of tail coverage, when a significant part of the aggregate has been exhausted. Thus the carrier could still charge up to 200% of the annual premium for a claims made policy tail coverage, even though only 15% of the aggregate remains.

VII. RECENT PROPOSAL TO INCLUDE DEFENSE COSTS WITHIN AGGREGATE POLICY LIMITS

ISO, unfortunatey has come up with a proposal exacerbating the problem of the exhaustion of policy limits. Its president Dan McNamara, has suggested including defense costs in policy limits.

By his own estimate some policyholders could find their coverage cut in half based on the current rate of defense cost spending. The analogy that "The operation was a success but the patient died", comes to mind. Aggregate limits will be further reduced at the expense of policyholders who will become financially impaired or perhaps bankrupt by litigation costs. By including defense costs in the aggregate limits, ISO is removing an integral element of coverage for which insurance is purchased. Given both the devastating impact that this proposal will have on many policyholders, and the time and effort which ISO maintains has gone into the CGL revision, RIMS must question why a change of this magnitude was made well after the proposed CGL changes were evaluated by the non carrier community and after the forms were submitted for filing in some States.

VIII. POTENTIAL LOSS EXPOSURES OF INSUREDS AND NONINDEMNIFICATION OF CLAIMANTS UNDER THE NEW CLAIMS MADE FORM

The crucial issue that the department astutely raises is the inappropriateness of claims made coverage for most policyholders. Suppose a contractor remvong asbestos from a school building or a manufacturer providing sterilizing equipment to a dairy plant have claims made coverage. Potential claims arising from these activities may likely not be made for many years after the policy expires. Claims made coverage gives the insurer a free ride during the early policy years when claims are less likely to be made.

Tragically, given the strong possibility of policy non renewal or cancellation, the insurer may not be there when coverage is needed the most—years after the initial policy term. Depending upon their financial resources, the contractor or manufacturer will be bankrupt or financially impaired. The school district or dairy will be looked to by potential claimants for indemnification. In the case of the school district it will be the taxpayer who will most likely fund the loss. In the case of the dairy, insolvency may very well occur from a large loss, and other potential claimants will be left without an avenue of relief.

IX. FUTURE UNAVAILABILITY OF OCCURRENCE COVERAGE

ISO will no doubt attempt to counter all these objections by maintaining that the occurrence form will still exist. Unfortunately while the form may exist, occurrence coverage may not. Indeed, as inappropriate as claims made coverage may be for most insureds, RIMS may not be objecting to the proposed claims made format if we were convinced as to the continued availability of occurrence coverage. It takes no great insurance analyst to divine the fact that if insurers and reinsurers have their way, occurrence coverage will be as difficult to obtain as parts for a 1938 Ford. Numerous articles in insurance publications are sounding the death knell for the occurrence form; numerous carriers including the excess market, have stated they will no longer offer occurrence coverage on most lines.

However, one may need to look no further than ISO to get a true picture of their projected future for occurrence coverage. According to testimony submitted by the National Association of Insurance Brokers, ISO has stated that once the new CGL forms are approved, it (ISO) will cease to collect and analyze existing non aggregate occurrence data. If this is so, RIMS believes that the future data base for developing occurrence rates will be incomplete and useless for ratemaking purposes. If current market conditions are such that underwriters will offer only the claims made contract, no occurrence data (aggregate or non aggregate) will exist and occurrence coverage will become a thing of the past.

Nor does ISO's educational effort indicate much of a projected future for occurrence coverage. ISO has devoted almost its entire educational effort to proselytizing the virtues of the claims made form. Occurrence coverage is mentioned only in the context of comparison with the claims made form. Nowhere in the society's reading of ISO's educational material do we find a reference as to when occurrence coverage would be preferable or more appropriate for the policyholder.

It must also be noted that integral instruments of ISO's proposed educational efforts will be the agents and brokers. These intermediaries have been designated by ISO to educate the insurance buying public. How much effort would you expend as an intermediary explaining the advantages or appropriateness of occurrence coverage, when the insurer has no intention of offering such coverage? The society casts no aspersions on either agents or brokers, who through their trade associations have pointed out to ISO the inadequacies of its claim made policy. However, if ISO or the New York Insurance Department is depending upon this educational effort to create an enlightened body of insurance consumers, they will be sorely disappointed.

In short, the so-called freedom of choice offered under ISO's dual formats, is more illusory than real. In reality claims made coverage will be forced upon the insurance consumer whether he wants it or not.

X. NEW CGL POLLUTION EXCLUSION

Before closing, I would like to make a quick reference to the pollution exclusion in the new CGL.

Unfortunately, the insurer's non-insurance approach to insurance is not limited to the claims made policy. The new policy forms virtually eliminate all pollution coverage from general liability policies. Whether coverage will actually be available under a separate endorsement providing environmental impairment liability indemnification, is a matter open to serious question. It is not only the chemical manufacturer and large corporation which will be affected by this exclusion. It is the "little guy', the neighborhood cleaner, car repair shop, and gas station which will be left unprotected. RIMS is not unaware that expansive court interpretations of the present CGL forms, and legislatively imposed liabilities have made underwriting environmental impairment liability coverage most difficult. However, excluding such coverage entirely from the CGL form is not a legitmate insurer response.

Surely, ISO has sufficient resources to draft "sudden and accidental" language which, while restricting coverage to exclude gradual pollution, would not eliminate coverage altogether. Similarly, RIMS understands that the carriers cannot and should not accept every pollution risk that comes along. However, when selectively becomes total exclusivity, the product ceases to be insurance. Wouldn't it be better for insurers and the industry to work together to find a way to make "sudden and accidental" pollution a manageable and insurable risk? All ISO and the carriers have done is thrown in the towel.

Before turning the microphone over the Bill Blick to respond to some of the questions posed by the department in its hearing notice, I wish to make one concluding point. RIMS has faith in the capability of ISO and the carrier community to develop policy language which will serve the needs of the insurance buying public and potential claimants, yet which still address insurers' legitimate solvency and profit concerns. Clearly, only the interests of the insurer are served by these proposed CGL changes. Until the legitimate needs of the insurance buying public and potential claimants are also accommodated, RIMS urges the New York Insurance Department to reject the new ISO claims made format.

QUESTIONS POSED BY THE NEW YORK INSURANCE DEPT. ON ISO'S CLAIMS MADE POLICY

1. Does the "claims-made" policy approach offer a long-term solution, or only a short-term response, to the industry's underwriting and capacity problems? What alternative approaches might be more effective to addressing these basic issues?
2. Will the "claims-made" policy avoid, or merely postpone, a consumer cost and availability crisis?
3. Should a premium dollar threshold, e.g., $10,000, be required for claims-made policies?
4. Should the "claims-made" policy be authorized for all types of liability coverages, or should it be permitted only for certain sophisticated buyers and selective risks, such as professional, pollution and products liability risks? Even if the "claims-made" approach is limited in this fashion, will it help in terms of the availability and affordability of these coverages?
5. Would the "claims-made" policy approach be beneficial, or harmful, to the unsophisticated buyer?
6. What steps should be taken to assure that buyers, however sophisticated, fully understand the differences, in coverage and consequences, between the "claims-made" and "occurrence" policy?

7. Should extended coverage (tail) coverage and prior acts (nose) coverage be mandatory in all, or only in limited, circumstances, such as when an insured transfers from a "claims-made" to an "occurrence" basis or when a gap in coverage arises?

8. If "nose" and "tail" provisions should be required, under what terms and for what length of time? Should a mandatory premium cap be imposed for "nose" or "tail" coverage?

9. Should rules be developed to reconcile "umbrella" policies with the primary insurance policies?

10. What are the reinsurance ramifications of the "claims-made" approach?

11. What effects will the "claims-made," compared to the "occurrence", approach have in terms of litigation?

Ladies and gentlemen, as Mr. Harkavy previously stated, I am William Blick, assistant treasurer of the Allen Group, Inc., and as a practicing risk manager and RIMS' liaison on ISO's effort, I will direct additional comments to the several key issues raised by the New York State Insurance Department.

With me are some of the members of our committee who have assisted me in this joint effort: Norman Chanzis, Dick Van Wagoner, and David Blake.

First of all, we do not see the "claims-made" approach as a long-term solution or short term response to the industry's underwriting and capacity problem. We see it as an "erasing" mechanism that allows the underwriter, who presumably is more sophisticated than the average buyer, to cancel the implied promises that were made at the initial writing of the business unless he gets more money in one fashion or another. It is obviously a short-term response triggered to the current market condition. It is one that provides the carriers a quicker ability to react to a perceived set of circumstances, to avoid paying losses, or as an alternative mechanism, to charge higher premiums than were originally agreed upon. The media is reporting that the claims made format will provide the industry with more capacity, but I, concur with Mr. Harkavy that this possible additional capacity will probably only be made available for those that buy claims made policies. However, the claims made format has the inherent defect of not providing needed coverage. Thus we believe that claims made neither postpones or avoids a consumer availability crisis. Regarding an alternative approach, RIMS believes that existing capacity problems can be addressed within the existing occurrence form. if premiums increase, as may be required for the short term, the least the industry can do is work to stabilize the future pricing of the product to eliminate the tremendous peaks and valleys of recent years. In short, as Mr. Harkavy stated earlier, buyers would rather pay more for a reduced level of defined and needed coverage than to receive protection under a policy which is illustory at worse and uncertain at best.

We oppose the "claims-made" approach because it is confusing to the average buyer. We believe that it reduces competition and ties the buyer to a carrier indefinitely, thus eliminating competition.

It is inconceivable how the average buyer in a difficult market condition, when presented with the alternative of the up to 44 percent of a discount on the initial year and with very little said about the potential 200 percent maximum qualified pricing on the tail, will be able to make a qualified judgment on which form to choose. Moreover can an enlightened decision on what form to choose be made under the uncertainties inherent in the new CGL? ISO provides for a 200 percent of premium maximum for the purchase of tail coverage, but it never defines "premium". What will be the tail purchase price for retrospectively rated policies, where the initial premium is modified by the insured's loss experience.

We are also wondering about reinstatement of aggregate limits. Will it be possible to get it and under what circumstances? Will the excess insurer demand reinstatement of the aggregate limit before offering coverage?

Moreover, the mini tail and extended reporting provisions are not absolute. The initial claims made policy can be structured so as to eliminate both these provisions. The uninformed may not know what he is giving up; the sophisticated buyer might know what he is being denied, but still may be faced with a take it or leave it offer.

Similarly, the potential exists that the so called laser beam endorsement approach can be used to gut the coverage that is offered to a policyholder. Although the rating manual might say certain coverage is available, if the carrier does not provide it because of certain exclusionary wording in the policy, then the coverage does not exist.

Given all of these uncertainties, and the vast difference in the scope of coverage between the claims made and occurrence policies, there will be an increased likelihood of errors and omissions litigation between intermediaries and uninsureds. Yet despite all these uncertainties inherent in the new formats, you are being asked by ISO to follow like blind sheep and approve the claims made approach.

In response to the question about requiring a threshold, if the purpose of the $10,000 threshold is to restrain unsophisticated purchasers of insurance from utilizing a "claims-made" policy, frankly, a $10,000 threshold is much too low.

Perhaps we should think in terms of $100,000 or a quarter of a million dollars—that would be more in line.

As advocates for both the large and small insurance consumers, we emphasize that the "claims-made" format cannot and should not be used in an across-the-board approach. "Claims-made" coverage is more likely inappropriate for sophisticated and unsophisticated buyers alike. The only difference is that the sophisticated buyer will probably know the total inadequacy of the protection that is being offered.

We agree with the suggestion posed by the department as to the desirability of mandatory prior act (nose) and tail coverage should the claims made form be approved. However given the continued uncertainty inherent in the claims made approach, wouldn't it be more constructive to spend our efforts trying to get adequate pricing and sound underwriting, utilizing the new occurrence forms?

Regarding the question of whether or not rules should be developed to reconcile umbrella policies with primary insurance policies, this is a little difficult for us as buyers to respond to. Much has been said about the umbrella carriers not accepting some type of standardized policy. I would point out to you that this was also the situation of the primary insurance market for many years in its earlier days. Yet they managed to get their act together to provide a standardized CGL policy. I see nothing wrong with requiring stricter standards for excess carriers, perhaps utilizing a standardized umbrella format.

Before concluding, would like to reiterate RIMS opposition to the blanket limitation of pollution coverage in the new CGL. We acknowledge that "gradual" pollution exposures, faced by industries whose activities inherently expose them to often huge environmental impairment liability, should not be within the scope of CGL coverage. However under ISO's complete exclusionary approach, coverage is taken away for unique and unusual "sudden and accidental" incidents. The 95 percent of the policyholders whose exposure for environmental impairment liability is slight will be denied coverage for the rare incident which could bankrupt them—precisely the situation which the purchase of insurance is designed to avoid.

Although "sudden and accidental" coverage is needed protection which could be handled under the CGL mechanism, ISO chose the easiest path by lumping it together with "gradual" coverage and excluding it altogether. ISO could have made the effort to define "sudden and accidental" in much more finite detail so as to distinguish it from "gradual" coverage. Instead they threw up their hands and said we can't define "sudden and accidental" so we will not offer any pollution coverage at all.

The problem doesn't go away—through this exclusionary approach the insurance companies are just walking away from it. However somebody is going to have to pay, whether it's through taxation or judicial awards that may bankrupt many, many businesses. Ultimately, if bankruptcy occurs then the States, cities, and Federal Government are going to have to pay recovery costs. If ISO would work to adequately define "sudden and accidental" pollution in its new CGL, the insurance industry could make an important contribution to the pollution problem in a manner that would not jeopardize their legitimate profit and solvency concerns.

In conclusion, the Risk and Insurance Management Society, Inc., which I am representing opposes this "claims-made" form. We don't deny that ISO has tried to be responsive to industry comment by re-working the initial drafts that were presented; for example, by removing the first discovery format. However, the bottom line is that the new CGL formats do not meet or protect the needs of the insurance buying public.

Senator **KASTEN**. Thank you very much.

Our next witness, Mr. Sol Schreiber, an attorney and also an adjunct professor at Fordham Law School.

Mr. Schreiber.

Mr. **SCHREIBER**. Thank you, Senator. It is a pleasure to be here. I came last week to get a drift of what was going on, and having heard you when Senator Danforth made such strong statements about the legal profession, I thought it appropriate that I return.

I speak to you, not as a representative of the profession, as one who has spent almost 29 years in civil litigation. My background is one of having been a defense lawyer for an insurance carrier for many years, a plaintiff's lawyer, a judicial officer, and a special master in major litigation, primarily agent orange. I have also been president of a major insurance program. For the past 15 years I have taught as an adjunct professor at Fordham Law School and have been chairman of CLE litigation programs at the American Law Institute; American Bar Association Committee on Continuing Professional Education for more than 10 years. I have edited about 20 works. So you can see I have many experiences and wear many hats.

I applaud the subcommittee in its search for an alternative to the present costly and time-consuming process of resolving product liability disputes.

I would like to start by offering some suggestions on S. 100 before talking about alternative compensation programs and the problems of the insurance industry covering products.

First, I believe that the committee should consider adding a periodic or structured settlements or judgments title for cases over $250,000 or $500,000. Periodic payments is now in place in California in the medical malpractice field. There is a uniform State law commissioners bill on it and the New York legislation is presently considering it both in products liability and medical malpractice.

It is estimated that a periodic or structured payments plan could save approximately 15 to 20 percent of the cost of insurance, and believe that it is both a sound economic and rational approach. One that would provide proper payment to the injured an aid a disabled insurance industry, which gives strong signs of limiting or withdrawing its coverage in this volatile field.

With respect to some of the transactional costs and savings in S. 100, may I offer those suggestions:

First, the closed carton or retailer's exception will not work unless you permit nationwide service on manufacturers. We have precedent for this in the securities field. I strongly suggest you consider certified mail service on all manufacturers. This would also resolve the problem of service upon foreign manufacturers because we have heard today how manufacturers are considering setting up plants or purchasing goods from foreign countries with the hope of avoiding litigation with the United States. How such foreign manufacturers will be served can be a serious problem. I believe that the Supreme Court, as just 2 weeks ago—in the *Burger King* case—indicated that you can satisfy due process requirements by having some form of sound notice.

Second, with respect to collateral source, your bill suggests some form of collateral source rule on workmen's compensation. I offer you the suggestion that collateral source could aid in balancing judgments or settlements. If this were done, there could be a considerable saving. One should recognize that when people take out collateral insurance, they do not take it out so they could use it as an added return in the event of a lawsuit, they take it out to cover themselves. Insurers, I believe, do not factor in the issue of collateral source liens or returns on liens or setting rates. I would suggest that you have to be careful, however, and make sure that if you use collateral source as a reduction, you do not permit any lienholder to come forward and take a second "bite.".

Third, there is the question of pain and suffering. Here, I believe, one must come to grips with the issue as to whether there should be some cap on pain and suffering. Whether it is $250,000 or $500,000, as long as there is a certainty to it, the insurance industry claims it can adjust to it, and set fairer rates.

As far as the alternative compensation systems are concerned, the Dodd-Gorton approaches are challenging and, I offer these brief suggestions:

One, please do not get the federal court involved. It is already deeply involved in too many issues and claims, plus the fact that the issues belong in the state courts. You will continue the friction between state and federal courts when you remove matters from the state court and put them into the federal court system.

Two, alternative compensation should not bar tort claims, and attorneys must play some role when injuries are significant.

The insurance casualty industry is presently in great dislocation. The Lloyd's market has suffered, Bermuda off-shore programs have faltered, reinsurers great dislocation. The NAIC, National Association of Insurance Commissioners, estimates that 15 percent of the 2,500 casualty companies in the United States are on a watch list. I suggest to you it is probably 20 to 30 percent that are in seriously weakened positions facing reorganization or liquidation. Despite this parade of horrors, stocks in this industry are rising.

How has this come about? For the last 7 or 8 years the industry has been more interested in investment income than it has in judging the severity of claims. They have failed to properly set reserves, and have overestimated their surplus. These stories have been reported in such sound publications as the Journal of Commerce, the Business Insurance, and most recently in the New York Times.

There are many quick solutions as I outline in my written remarks, but as the previous speaker has suggested, the problem is extremely severe. Beginning in January 1986, it will be even more severe because corporations will be greater combat with their insurers. Within a year I suggest corporations will be beating on your doors asking what has happened in this area? Why has the insurance industry reduced coverage and capacity, and you will be urged to investigate.

I urge you to continue your efforts. I am sure that there is a meaningful solution, one that will not be the perfect answer, but one which will be an improvement over the present state.

Thank you, sir.

[The statement follows:]

STATEMENT OF SOL SCHREIBER

Last week I attended the hearings on this sub-committee and was most impressed by the comments of Senators Danforth and Kasten regarding the need for trial lawyers to become part of the process to add a victims' compensation provision to S. 100. As one who has spent almost 30 years at the bar in the litigation arena wearing the hats of both a defendant's and plaintiff's counsel, a judicial officer, a Special Master in significant products liability litigation, and a teacher of law students and lawyers in the continuing legal education field, I applaud your sub-committee in seeking to find alternatives to the costly and time-consuming process which we presently utilize in the resolving of many product liability cases.

I hope that these brief remarks may be of assistance to the sub-committee. I would like to raise a number of issues concerning S. 100, the proposed alternative compensation program and why the insurance industry may be opposed to these recent amendments.

First, with respect to S. 100 I believe that the sub-committee should consider adding a periodic or structured payments title. A number of states have adopted such a program and others are seriously considering such an addition. The Uniform State Commissioners have drafted a periodic payments statute. California has adopted it in the medical malpractice area and the New York Legislature is presently examining it in connection with proposed medical malpractice and products liability bills. Such a program would pay out large judgments or settlements over a number of years. When a claim of pain and suffering or lost wages covers a 20-year period, a judgment or settlement paid out in a structured program would reduce the costs considerably. From an actuarial point of view this could add up to a 15–20% saving of costs.

With respect to the latest draft of S. 100, a number of proposals, I suggest, will not bring about transactional savings but may increase the costs of litigation. For example, the "closed carton" exceptions which would free retailers from involvement in litigation could only work well if the provisions of the Act contained a nationwide service of process upon manufacturers. We have precedent for this procedure in securities litigation. Unless such provisions are included, the preliminary skirmishing could take years before the proper manufacturer is before the Court. One possible solution would be to provide that service may be made upon a manufacturer by the use of certified mail. While this may raise some due process arguments, I believe that the recent case law from the Supreme Court would support such an approach if proper notice were given that a manufacturer supplying goods would be open to service of process by certified mail.

With respect to the question of collateral source rule, there is some provision concerning workers' compensation benefits in the present Act. There is, however, a need to seriously consider whether collateral benefits should be utilized as an offset against present recoveries with the understanding that liens for such payments would not thereafter be honored. While it is true that collateral benefits are paid for by insured parties in some form, it is also true that the setting of such benefits does not really take into account possible subrogation recoveries. Thus a significant cost could be alleviated by making such benefits an offset with the necessary protection against a "second bite" by a lien-holder. While there is some attention in the Act to the issues of punitive damages, the proposed changes would not materially affect the cost of such claims. Of more significance, however, is the need to examine the question of setting certain limits to the issues of pain and suffering. In a number of jurisdictions such claims for medical malpractice have been limited to $250,000. These same jurisdictions also involve structured settlements beginning at that level. I suggest that the level is too low and should probably be set at a more equitable area of $500,000.

ALTERNATIVE COMPENSATION SYSTEMS

Both amendments by Senators Dodd and Gorton represent a challenging new approach to the handling of claims for products liability. However, there is some question whether the proposals for further utilization of the federal court system is a sound one. Both bills suggest such utilization at appropriate spots in the process.

Today we are seeing many different approaches to reducing the costs of tort litigation ranging from voluntary alternative dispute resolution, court-directed early neutral evaluation, arbitration, mediation and summary trials. All seek to reduce the costs of litigation and to more adequately and expeditiously compensate the injured victims. I believe that the alternative compensation systems proposed by Senators Dodd and Gorton, if properly tailored to fit the present conflicts, would bring about quicker and fairer payments to injured parties at a lower economic cost. It will not solve all the present problems but can be a significant movement in the right direction. These proposals should have been strongly supported by the insurance industry. The proposals contain many of the features of the workmen's compensation or the no-fault programs and could be a profit-center for the industry. The reluctance of insurers to support these proposals may be due in part to the present severe dislocations within the industry. Such dislocations have arisen in the Lloyd's market, the self-insurance markets in Bermuda, the reinsurance field and in domestic insurance companies. The National Association of Insurance Commissioners has estimated that approximately 15% of the 2,500 casualty companies in the United States are on a "watch" list. This figure is a rather conservative one and it is probably closer to the 20–30% range. While it is true that the problems have been due in part to significant tort changes, it is also evident that they were also due to an unwillingness or refusal by the insurance industry during the past 7-8 years to recognize a major upswing in the severity of claims and to adjust their claims reserves and set adequate costs for insurance. More interested in the interest rate on the flow of premiums received, the industry has for a long time underfunded their reserves and overestimated their surplus. As the writing of premiums is set by a ratio with surplus, it is evident that surplus was over-estimated so that a higher premium flow might take place. Had the insurers transferred monies from surplus to claims, as they are now doing, there would have been less emphasis on premium flow and on the setting of proper reserves. This problem is now surfacing in major companies and has brought about part of the "crisis".

The daily insurance page of the Journal of Commerce or the news stories in the weekly Business Insurance and National Underwriter magazines—all responsible press publications—have featured the accelerating problems of the casualty insurance industry. In addition, the recent front page story by Mr. Diamond of the New York Times well-describes the present problems as well as the future dislocations.

In an attempt to alleviate such difficulties the insurance industry is searching for a number of quick solutions to make up for years of underfunding and price cutting. These have included re-structuring the funding of employee-pension plans to provide one-time profits, tremendous increase in pricing, and a major reduction of capacity and risks. Most importantly, they have now proposed a new comprehensive general liability policy which includes a claims-made approach and other major limitations. The new policy will become effective on January 1, 1986 and bring about major collisions between corporate clients and insurers. It will probably result, I suggest in an outcry for congressional investigation of the industry, its limited coverage and risk policies and its high-premium approach. All this may in part explain the reluctance of the industry, beset with great difficulties, to seriously examine the strengths of alternative compensation programs.

I strongly recommend that the sub-committee continue on its course. I am sure that the forward-looking members of the insurance industry, the corporate world and consumer groups, as well as the American bar will aid you in developing a fair and equitable alternative compensation program for the products liability bill.

Senator **Kasten** Mr. Schreiber, thank you.

I share your concern about the urgency of this. I think that we are seeing the problem accelerating at a geometric pace, and we are going to be faced with very, very difficult problems next year and the year after if we are not able to somehow deal with parts of this issue.

Our last witness on this panel is Mr. Robert Hunter, the president of the National Insurance Consumer Organization.

Mr. Hunter.

Mr. **Hunter**. Thank you, Mr. Chairman.

Ten years ago I was Federal Insurance Administrator and serving on several interagency task forces dealing with the insurance crises of the midseventies, including one that dealt with the issue of product liability; 10 years later we are faced with the same sort of a problem. I asked myself why is that, and part of the answer is that if God had said "let there be a Federal interagency task force to study light" instead of "let there be light," we would still all be groping around in the dark.

But more to the point is that the primary condition that led to the midseventies crises is in place again, not the tort law because that has not changed too much except in the direction of "reform" as the manufacturers define it, but the recent bad underwriting results that we have just heard about.

I would like to thank Senators Dodd and Gorton for moving the debate beyond restrictions on the victims of defective products to compensation. I think that has been an important development. But we think the proposals are preliminary, and there are many concerns.

The primary concern I have is are you going to get anything if you pass the bill? Would you get a stable, affordable insurance market? What are the guarantees that you have from the insurance industry? What is the cost that they would charge under systems such as those that are proposed? What are the program interrelationship problems?

I share the consumers' concerns of restrictions on benefits for noneconomic injuries, the informed choice questions, the eligibility standards questions, and having dealt in bad faith punitive damage suits in the insurance business, I am very concerned that we have some kind of a mechanism for consumers, if you do go to a no-fault system, to take care of any vexacious delay and denial, that there be some mechanism for ultimately getting into a court.

NICO prefers Senator Gorton's approach, but we think there needs to be significant study of these important questions. Before the Federal Government took a position on no-fault auto, there was this major 26-volume study by the Department of Transportation. I am not saying there has to be something like that, but I think we at least have to answer the kinds of questions that Gene Kimmelman raised: Who are not getting benefits today? How much would it cost? What would the savings be? Would they be in balance? Are we talking about a more expensive or a less expensive system? I think those are very important questions.

Now, in 1974-75 we had those crises like product liability and medical malpractice. Today we have joining those daycare centers, municipalities, hazardous waste facilities, and others unable to get insurance.

Now, all of last year's acceptable insureds are not suddenly manufacturing shoddily or hiring child molesters to take care of children or something. They are the same risks that they were a year or two ago. What has happened is the insurance industry is in somewhat of a state of panic, and in these 18 months to 2 years or so that we have facing us of that sort of crisis thinking before it is over, if this cycle is typical, we have to worry about what are we going to do.

Insurance is supposed to stabilize things, not destabilize them. How can Congress act to stem the boom-bust approach when a few years ago MGM could buy insurance after their Grand Hotel burned down and now good clients are cut adrift?

One answer may be found in the way the Federal Government responded to the riots of the 1960's. You may recall that when insurers were pulling out of the inner city, bankers started to pull mortgages. That was a very serious problem, and they came up with a system called the riot reinsurance system which did solve the immediate problem and allow time for studies of how to take care of the underlying riot situation. I believe such authority could be quickly made ready for lines that are distressed today.

When a line becomes distressed, the Government should meet with insurers to determine what the specific fear is, child abuse at daycare centers or shoddy manufacturing or the tort law. The Government should then meet with representatives of affected industries and insurers to devise criteria for what is a safe daycare center or product, a model for risk management. Next the program would offer reinsurance to insurers for a fee to insure against those specified perils. In return, insurers would agree to write through pools or otherwise daycare centers or product manufacturers which meet the definition of "safe" as devised by the Government working with the others.

The Government would reinsure all businesses of this sort for participating insurers, even those not insured in the pool, just as was the case in the riot reinsurance program, to get spread of risk. Funding for such a program should be through borrowing authority initially but can be self-sustaining over time. A small premium tax of, say, 1 quarter of 1 percent on all property casualty insurance policies could be collected in addition to the reinsurance fees. That would generate roughly $3 billion over the 10-year cycle but would only cost 81 cents on the average private passenger auto insurance premium per year.

If the program were in place now, we would have no crisis because business costs for insuring their products would not be inflated to the degree they are now. The problem is there is no reinsurance market. A federally sponsored reinsurance program would provide you time to do the kinds of fix you need on the tort reform and to do the studies you need of the compensation system before you move in too fast to make a fundamental change in those systems. That to me would be a short term step that would buy you time to do the kinds of careful research necessary to implement those other systems.

Thank you, sir.

Senator KASTEN. You began by saying that we did not need a Government interagency study or task force, and suggested I think three studies in the process of your 5 minutes. So I am hopeful that the process that we are going through right now in terms of developing ideas along with the work that we are doing with a number of the people that have testified is going to lead to the kind of compromise that I think that Senator Danforth and I and others are looking toward.

In the interests of time, we later may submit a number of questions to each of you for the record, and Mr. Schreiber, we particularly look forward to working with you in terms of some of the ideas that you have developed.

But I would like to thank the three of you for your testimony. On behalf of the Consumer Subcommittee, I would like to thank all of the witnesses who have testified here today. We have heard a number of thoughtful comments.

The record of the hearing will be held open for 2 weeks for additional statements and so that members of the committee may submit additional questions to witnesses to be answered for the record.

Thank you.

The hearing is now closed.

[Whereupon, at 1:05 p.m., the subcommittee recessed, subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF AMERICAN INSURANCE ASSOCIATION

The American Insurance Association is pleased to submit these comments on the legislation concerning product liability which is before your Committee. The American Insurance Association is composed of 174 members. Our membership provides the majority of the commercially underwritten product liability insurance in the United States. We very much appreciate the opportunity to testify before you and commend your Committee for its careful consideration of these complex issues.

The American Insurance Association has for some time supported the concept of legislative change at the federal level to create more reasonable, equitable and rational product liability law on a uniform basis for all of the states. We are concerned with the trends emerging for product liability law in the various states. Current product liability law is neither predictable nor reasonable. It is subject to wide fluctuations. As it is now structured, we believe that product liability law is neither susceptible nor conducive to sound insurance practices. It is not even conducive to good safety practices. AIA believes that S. 100 will restore stability to this field of law and will do so in a way which would be beneficial to injured persons, manufacturers, and the judicial system.

Our basic position remains that the uniform system of product liability law based on the premise of finding a manufacturer or seller at fault is in the best interest of all. Such a fault-based concept would enable a manufacturer to assess its potential liability, to determine its course of action in accordance with those standards, and to perform accordingly.

The American Insurance Association is concerned with proposals which would in part or in whole graft a compensation system based upon injuries from exposure to products onto a fault-based tort liability system. We believe that such a dual system would be distinctly more expensive than the current system. From our financial perspective, our recent experience has shown us that expansion of the law to include application to past activities particularly when that expansion is of great magnitude, is unfair. Retroactive application of new legal standards also makes the liability rules unpredictable to insurers. There are enough aspects of unpredictability in the tort system to be accommodated by an underwriter without having to anticipate that a liability system could be scrapped entirely and a compensation system more expensive substituted in its place. Insurers' experience in other areas has shown that such a system could be interpreted by the courts as being covered by insurance policies which never contemplated such a system nor charged any premium for it. Any compensation proposal must be viewed by the insurance industry with this concern in mind unless it is assured that the proposal would operate only prospectively with no coverage under insurance policies written before enactment.

Also, from an insurance point of view the absence of statistical information upon which to make projections of costs would mean that a compensation mechanism would be extremely difficult to price and would probably be uninsurable in the commerical market until such time as reliable data became available. It may turn out that such data may never be available. Insurers are concerned that if and when such data becomes available, it would indicate that the cost of such a compensation system is beyond the ability of industry to absorb it. Key factors here would be the trigger for compensation and how carefully compensation is defined and limited.

We commend those Senators who have recognized the distortions which have arisen in the product liability mechanisms operating at the state level. We fear, however, that the shift to a compensation approach without more understanding of what that would entail is premature. The American Insurance Association can say, based upon our observations, that certain categories of products might be more susceptible to this sort of a compensation mechanism than others. These product types may well be those which are more often involved in traumatic injuries, where the least complaint of undercompensation has occurred. It is possible, therefore, that a compensation scheme might well result in overinclusiveness in those instances where the tort system now operates moderately well and might in other instances create enormously expansive liabilities.

Those of you who have recognized the drift, expansion, and potential harm to the economy caused by the product liability system, and those of you who have attempted to address those problems are to be commended. The American Insurance Association stands ready to work with you in addressing those problems.

The American Insurance Association wishes to thank you for the opportunity to submit testimony on Senators Dodd and Gorton's product liability compensation proposals. We do have technical comments on these proposal which we will submit at a later date.

STATEMENT OF TERRY WESTHAFER, PRESIDENT, AMERICAN RETREADERS' ASSOCIATION

My name is Terry Westhafer, and I serve as President of the American Retreaders' Association. ARA is a national nonprofit trade association representing over 1600 members who are involved in the manufacture of retreaded automobile, truck, and airline tires, the repair of such tires, and the sale of related products and services.

Mr. Chairman, I appreciate this opportunity to testify on the amendments to S. 100 that have been introduced by Senators Gorton and Dodd. We initially testified in support of S. 100 because we believe that there is a need for uniform product liability law. We continue to contend that such legislation is long overdue. While we, as members of the Committee, have had little time to completely evaluate the amendments, our initial response is a positive one.

Our understanding is that the intent of the amendments is to allow accident victims to file a claim with the manufacturer responsible for a product which conformed to industry and/or government regulations but turned out to be hazardous causing personal injury. Such a claim would provide compensation. For compensation purposes, it would be considered adequate to prove the product caused the injury. A claim of this type would not be open to litigation. Compensation would be limited to medical bills and lost wages. Punitive damages and suffering would be eliminated from consideration.

Current product liability laws tend to discourage accident victims with minor injuries or questionable cases from initiating a lawsuit. These amendments are pro-consumer in that it could increase the likelihood of some compensation being given to these types of claims. Opponents suggest, however, that these provisions would make it more difficult to initiate and win a product liability suit.

The amendments would likely increase the number of insurance claims paid but readically reduce the number of lawsuits and the total amount of compensation awards.

We were very disappointed when this Committee failed to pass out S. 100. As bill sponsor Senator Robert Kasten contends, no area of civil law today is more confusing, more costly, or more counterproductive than product liability law. There exists no uniform national law. Approximately 30 states have product liability statutes, and no 2 are the same. Whether it be an injured consumer, or a manufacturer or retailer, product liability law is a legal quagmire of 50 different jurisdictions with conflicting and ever-changing rules.

The levels of legal activism soar as the disparities become glaringly unjust. Certainly anyone wrongfully damaged should have access to the courts. But broad concepts of liability "externalize" the cost of negligence. S. 100 would "internalize" the cost of torts with stricter limits on liability, which would arise only from unreasonable dangerous construction and design, or from a failure to warn of danger, or from a failure to live up to an expressed warranty.

Product liability has unfortunately expanded the litigiousness of American society and has caused some to raise serious concerns of legal ethics

Consumers ultimately pay the fare for these confusing product liability laws when the ever-increasing liability insurance rates are passed on in the form of higher retail prices. Rates are high because they are set on a national basis and respond to all vagaries and extremes in product liability case law. A single costly court decision could raise insurance rates nationwide. Such a situation is becoming a serious burden on interstate commerce.

The product liability reform issue crosses traditional political party lines. The Carter administration supported the concept of a Federal statute, and during the 98th Congress President Reagan endorsed S. 44.

Mr. Chairman and Members of the Committee, product liability is a problem of major concern. A fair and reasonable law will help to unclog our courts, promote public safety, and reduce consumer costs. We were disappointed that S. 100 did not pass this Committee, and we urge you to consider these amendments and to pass S. 100 in a timely manner.

STATEMENT OF DR. ROY LITTLEFIELD, EXECUTIVE DIRECTOR, GREATER WASHINGTON/MARYLAND SERVICE STATION ASSOCIATION

My name is Roy Littlefield, Executive Director of the Greater Washington/Maryland Service Station Association ("GWMSSA"). GWMSSA is a regional nonprofit trade association representing over 1,000 service station operators located in the District of Columbia and the State of Maryland.

Mr. Chairman, I appreciate this opportunity to testify on the amendments to S. 100 that have been introduced by Senators Gorton and Dodd. We initially testified in support of S. 100 because we believe that there is a need for a uniform product liability law. We continue to contend that such legislation is long overdue. While we, as members of the Committee, have had little time to completely evaluate the amendments, our initial response is a postive one.

Our understanding is that the intent of the amendments is to allow accident victims to file a claim with the manufacturer responsible for a product which conformed to industry and/or government regulations but turned out to be hazardous causing personal injury. Such a claim would provide compensation. For compensation purposes, it would be considered adequate to prove that product caused the injury. A claim of this type would not be open to litigation. Compensation would be limited to medical bills and lost wages. Punitive damages and suffering would be eliminated from consideration.

Current product liability laws tend to discourage accident victims with minor injuries or questionable cases from initiating a lawsuit. These amendments are pro-consumer in that it could increase the likelihood of some compensation being given to these types of claims. Opponents suggest, however, that these provisions would make it more difficult to initiate and win a product liability suit.

The amendments would likely increase the number of insurance claims paid but radically reduce the number of lawsuits and the total amount of compensation awards.

We were very disappointed when this Committee failed to pass out S. 100, and we hope that those Senators who opposed the initial bill will now consider these amendments and support S. 100. As bill sponsor Senator Robert Kasten contends, no area of civil law today is more confusing, more costly, or more counterproductive than product liability law. There exists no uniform national law. Approximately 30 states have product liability statutes, and no 2 are the same. Whether it be an injured consumer, or a manufacturer or retailer, product liability law is a legal quagmire of 50 different jurisdictions with conflicting and ever-changing rules.

The levels of legal activism soar as the disparities become glaringly unjust. Prior testimony before this Subcommittee indicated that the number of product liability suits filed nationally in 1974 totalled 1,579. By 1982 the number had risen to 8,944. Certainly anyone wrongfully damaged should have access to the courts. But broad concepts of liability "externalize" the cost of negligence. If someone foolishly abuses a product, for example, why should fellow consumers subsidize his actions? The questions should be what is unreasonable abuse and what is foreseeable. S. 100 would "internalize" the costs of torts with stricter limits on liability, which would arise only from unreasonably dangerous construction and design or from a failure to warn of danger or from a failure to live up to an express warranty.

Product liability has unfortunately expanded the litigiousness of American society and has caused some to raise serious concerns of legal ethnics. Complex laws and precedents spur lengthy litigation which in many cases leads to exorbitant costs. Studies presented to this Committee contend that for every 66 cents consumers attain in liability judgments, lawyers make 77 cents in legal fees.

Consumers ultimately pay the fare for these confusing product liability laws when the ever-increasing liability insurance rates are passed on in the form of higher retail prices. Rates are high because they are set on a national basis and respond to all vagaries and extremes in product liability case law. A single costly court decision could raise insurance rates nationwide. Such a situation is becoming a serious burden on interstate commerce.

Throughout the 1970's product liability insurance rates were established increasingly on a subjective basis. Addressing this reality Congress passed the Risk Retention Act of 1981. That legislation provided product sellers and manufacturers alternatives to commercial product liability insurance through the creation of risk retention or self-insurance groups or through purchasing groups which have the option of buying commercial insurance at favorable rates. The Act intended to assure that insurance rates and premiums be set on a fair and equitable basis.

The Risk Retention Act did not address the uncertainty in the outmoded, fragmented product liability tort litigation system. S. 100 would protect the interests of consumers, insurers, manufacturers, and product sellers. Manufacturers remain liable if the claimant can establish by a preponderance of the evidence that the product is unreasonably unsafe in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product failed to conform to an express warranty. A product seller is liable only for his own fault—the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of a claimant's harm.

S. 100 stipulates that if a product is a capital good, no claim alleging unsafe design or failure to warn in a product liability action may be brought from harm caused by the product after 25 years from the original purchase date. Proper exceptions are made in the claimant's harm was caused by the cumulative effect of prolonged exposure to the product or if the harm did not manifest itself until after the time limitation. Claims for harms which do not manifest themselves until many years after product use are thus excluded from the proposed time limitation on liability.

S. 100 also considers provisions regarding the effect of compliance with government standards on the liability of manufacturers or product sellers from harm caused by a product. A product in compliance with existing standards could be found unreasonably dangerous only if the claimant could produce clear and convincing evidence that the product was unreasonably unsafe and that a safer design was technologically feasible and would have complied with all mandatory safety standards.

The product liability reform issue crosses traditional party lines. The Carter Administration supported the concept of a Federal statute; the Reagan Administration followed suit and endorsed S. 44 in the 98th Congress.

Mr. Chairman and Members of the Committee, product liability is a problem of major concern. A fair and reasonable law will help to unclog our courts, promote public safety, and reduce consumer costs. GWMSSA was disappointed that S. 100 did not pass this Committee, and we urge you to consider these amendments and to pass S. 100 in a timely manner.

Manville Building Materials Group,
Toledo, OH, June 25, 1985.

Hon. John C. Danforth,
Senate Office Building, Washington, DC.

Dear Senator Danforth: I enjoyed attending the recent NAM Meeting in St. Louis. The information you provided on International Trade was very informative.

Your interest in passing product liability legislation is of particular interest to me. You cited several reasons why the passage is necessary, as well as what was needed for successful passage. Many of the items you cited are consistent with the content of the Asbestos Workers' Recovery Act, S.B. 1265. The AWRA uses the alternate system of Workers' Compensation, as you suggested was needed in the product liability legislation. It draws the consumers and manufacturers together in a system that is designed to be fair and efficient to all involved parties. You mentioned a system with certainty and simplicity is needed; the AWRA assures such a system, it provides readily available compensation for those injured by asbestos exposure.

You mentioned your intent was to re-introduce the product liability legislation. It seems to me that you are in an ideal position to cover the product liability issue from all angles, as Chairman of the Commerce Committee you can push the product liability legislation, and as a member of the Finance Committee you are in a position to see product liability cases addressed through the passage of the Asbestos Workers' Recovery Act. This in essence gives you two opportunities to see product liability legislation passed. Further, it is my understanding the product liability legislation before the Commerce Committee does not solve the Asbestos problem.

I urge you support of the Asbestos Workers' Recovery Act, S.B. 1265. Enclosed you wil find a "press packet" with information on the issue for your use. This is a more comprehensive packet than the one I supplied you with in St. Louis. If you wish additional information on the issue, contact David Pullen at our Public Affairs Office in Washington. He may be reached at 202-785-4940.

Respectfully,

Joellen S. Sullivan,
Manager, Special Projects.

DEMA,
Tustin, CA, June 17, 1985.

Hon. **Robert Kasten,**
U.S. Senate, Washington, DC.

Dear Senator Kasten: Members of the Diving Equipment Manufacturers Association request this letter to be included in the Hearing Record on the need for Product Liability Reform.

As background, the DEMA membership represents retail sales of $500 million and its voice is an important influence in the recreation diving community. It is the primary organization that links producers, sellers, instructors and suppliers of recreation diving opportunities, together, to promote the safety and growth of the sport.

In addition, the industry spends approximately $450,000 promoting sports diving activities, and works cooperatively with the 2500 dive shops in the U.S. to support the sport through instructional and advertising programs.

The recreation diving industry's record of safety improvement is remarkable. In the past 6 years, diving fatalities have decreased more than 50%. This is even more astonishing when participation has more than doubled in the same time frame.

Yet, we find ourselves on the brink of being forced out of business. Our members are having extreme difficulties in obtaining product liability insurance. As an example, two of our members received quotes from 24 sources last year. When they went to bid this year, only one of the aforementioned companies was willing to offer insurance. And then at a 50% increase in premium rates.

Instructional (certifying) agencies are finding that liability premiums have increased from 70% to 110%

We are caught between two formidable groups. The trial lawyers and the insurance companies. There is no need to relate horror stories. As long as attorneys can envision large awards, they will go after the "deep pocket." More often than not, it has been the insurers. As the situation worsens, the insurance companies are refusing to insure even the slightest risk, and if they do, the premiums are such that a manufacturer finds he is non-competitive.

As an aside, 33% of the attorneys who took the examination in California passed the Bar this year. This brings the number of attorneys in California to 89,000. Assuming the average attorney generates $100,000 in income, this comes to a whopping $8.9 billion industry in California. By the way, there is 1 attorney to every 256 people in California.

The greed of trial lawyers has become so obscene that in San Francisco, they take ads out in newspapers soliciting limited partnerships for people to invest on possible returns from suits.

In addition, we are beginning to see a trend where legal costs are included in the amount of total insurance. If you have $1 million worth of coverage and attorneys fees are $400,000, only $600,000 is available for the payment of actual claims.

We were all sorry to see S. 100 fail to pass the Senate. Our members have read Senator Dodd's proposed amendment, and it appears that he is taking the proper approach, but it is only a slice of the bread, not the full loaf. We don't know that apples and oranges can be mixed in handling product liability actions.

This crisis must be resolved. If it is not, hundreds of thousands of people will be out of work, because there will be no one left to produce sporting goods product. Scholastic sports (usually supported by a football program) will be a thing of the past. Recreational diving will be but a memory and there will be a dearth of new products introduced as technological advancement will be stultified.

We need Product Liability Reform whether it be through the tort litigation system or as a pure no-fault compensation scheme. We urge the Congress to deal with the problem; it is at a crisis stage where only the trial lawyers stand to benefit. And they may feel the ax of their own hand before the situation is resolved, as there may be no one left to sue and no damages to collect.

Sincerely,

Robert L. Gray,
Executive Director.

MACHINERY & ALLIED PRODUCTS INSTITUTE,
Washington, DC, July 3, 1985.

Hon. ROBERT KASTEN,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR KASTEN: The Machinery and Allied Products Institute appreciates this opportunity to comment on proposals to amend S. 100, "The Product Liability Act."

As national spokesman for capital goods and allied product manufacturers, the Institute has for more than twenty years followed the astonishing growth of products liability. We have supported—and continue to support—adoption of a federal uniform products liability law.

Recently, the Senate Commerce Committee declined to report S. 100 to the Senate floor for action, opting rather to consider compensation alternatives to the present products liability system. Two similar but differing alternative compensation systems are now before the Committee—Amendment No. 16 to S. 100 offered by Senator Dodd (Page S.3183, Congressional Record, March 19, 1985) and Amendment No. 100 to S. 100 offered by Senator Gorton (Page S.6090, Congressional Record, May 14, 1985). Each has been offered as a substitute for S. 100.

ALTERNATIVE COMPENSATION PLANS

Background.—The Senate Commerce Committee report on S. 44 [1]—the predecessor to S. 100 in the prior Congress—provided for establishment of a Product Liability Review Panel charged with studying the need for federal legislation to provide damages, compensation, or benefits to claimants in either of two situations:

1. Persons who, through no fault of their own, have been harmed by a product and are unable to recover in tort because the manufacturer of the product did not know and could not in the exercise of reasonable prudence have known at the relevant point in time about the danger that caused the harm; and
2. Persons who, through no fault of their own, have been harmed by a product that was unreasonably dangerous and are unable to recover in the tort system because the responsible manufacturer cannot be identified.

From this proposal have grown the two fully-fleshed-out systems of alternative compensation proposed by Senators Dodd and Gorton. Perhaps the spirit of the proposals is best expressed in the testimony of Senator Dodd before this Subcommittee on June 18 when he said, "The judgment is that as between two innocent parties—the injured person and the manufacturer—the manufacturer should bear the loss." [2]

The "innocent" consumer vs. the "innocent" manufacturer argument apparently made its initial appearance in the testimony of David I. Greenberg, then Legislative Director, Consumer Federation of America, in testimony before this Subcommittee on S. 44. On that occasion Mr. Greenberg said, "Let me restate this problem in the simplest terms possible. Between an innocent manufacturer and an innocent victim, S. 44 chooses the manufacturer and says no liability. Yet of the two parties, only one could have prevented the injury through more research and development—the manufacturer. And of the two parties, only one could have insured against the injury through liability insurance—the manufacturer." [3]

Our statement on the Dodd and Gorton substitutes is divided into two parts—general comments pertaining to the approach underlying both proposals, and specific comments relating to certain individual provisions of both.

The general approach to alternative compensation plans.—Our general comments on the two proposals follow.

1. Premature.—In essence both measures would adopt a variant of "no-fault" compensation in pursuit of two broad ojbectives: first, to provide a means of compensation for those persons who are injured by products "through no fault of their own" and second, to provide—by administrative procedures involving a lowered standard of proof—for lessened but prompt payment of claims arising from product-related injuries.

These are worthy objectives and we are sympathetic with them. However, both proposals amount to attempts to write fundamental, organic law in an exceedingly complex area without benefit of past experience and with no state or federal model to follow. Admirable as these attempts may be, they are premature, and idea before its time, and, if adopted in somewhat the form suggested, could make a very bad situation still worse. A number of these possible results are discussed in the remainder of our statement.

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[1] Report 98-476, 98th Congress, Second Session, May 23, 1984, pp. 65-67.

[2] Transcript of Proceedings, page 26.

[3] Senate Hearing 98-302, Ninety-Eighth Congress, First Session, April 6 and 27, 1983, page 86.

These is a second important reason why the alternative compensation plan is premature. The casualty-property insurance industry, the medium through which it is assumed that losses resulting from product-related injuries will—at the manufacturer's expense—be distributed, is not ready to take on the added burden of risk which this proposal contemplates. Just as Congress has no model to follow, the underwriters have no experience upon which to base rates. Given their recent disastrous operating results, casualty-property underwriters more than ever need a solid statistical base upon which to base rates.

Even if there existed sufficient actuarial data to permit the establishment of reasonable premiums, there may not be sufficient underwriting capacity to provide necessary coverage. In February 1985, the Insurance Services Office, Inc. published a study entitled The Coming Capacity Shortage. According to this study, "Available property/casualty insurance may fall short of demand by $62 billion over the next three years." Although the insurance industry did not testify in these hearings and we do not presume to speak for that industry, the evidence cited above—which is public information—suggests that this potentially serious problem should be fully explored before proceeding with nay alternative compensation plan.

2. A faulty precedent.—We may be wrong but it seems to us that both "Dodd" and "Gorton" have adopted workers' compensation legislation as a model. It is faulty precedent. The "trigger" in the two cases is write different. In workers' compensation "no fault" means just that—the contributory negligence of the workers is irrelevant. The central issue in workers' compensation—inded, the only issue—is whether or not the injury occurred in the course of employment. Contrast that with the Dodd and Gorton substitutes where "proximate cause" reappears. Here the issue is what caused the claimant's injury?

If, as we believe, the proposals before the Subcommittee have borrowed liberally from workers' compensation theory, then we repeat with even more conviction that any attempt to write such legislation now in final form is premature. The model being followed, we repeat, is inapposite and a misleading guide.

3. A doubtful premise.—Both proposals for an alternative compensation system necessarily proceed from an initial premise that when a claimant presents his claim the manufacturer of the product on which the claim is based will pay the amount demanded within the time limits of 60 or 75 days. This is a doubtful premise if not a naive one. It files in the fact of elementary economics and the ornery natute of the human beast.

Let us reconsider those innocent victims. Unquestionably, some such are out there and we agree that means should be found to compensate them for injuries sustained "through no fault of their own." But there are also those out there—quite possibly a greater number—who are not-so-innocent and, given the customary practice of settling claims on a "nuisance" basis, these latter worthies can turn the later native compensation system into a shakedown racket.

At the risk of becoming tedious, permit us to restate the fundamental difference between workers' compensation and the "no-fault" compensation scheme here proposed. In the former the issue is the employment relationship, in the latter the cause of the accident. We can reform the tort system—few institutions need reform more badly—but we cannot legislate causation away. Nor will an Act of Congress make those who are not-so-innocent as pure as the driven snow.

4. Alternative means of dispute resolution.—What Senators Dodd and Gorton have done—and for which they deserve great credit—is something which goes well beyond an alternative ssytem of compensation per se. In a larger sense, they would provide an alternative system of dispute resolution. If such a system were to work, it would not have to be limited to products liability or even solely to causes that sound in tort.

But will the system work? We very much doubt it. Based on an ill-chosen model and proceeding from a faulty initial premise, the scheme, despite too much wordy detail in the draft statutes, suffers from a certain formlessness, an inchoateness which causes the reader to ask himself, "Just how would this thing work?"

One notes immediately the absence of any established institution—independent of the parties—through which demands can be made, proof offered, and terms negotiated. We must assume that the great majority of claimants will retain counsel who then, of course, becomes the intermediary between the parties—but not an impartial one.

Is the manufacturer expected to accept the claimants' recitation of facts concerning an event to which only the claimant and his witnesses are privy? Only if and when the parties agree to go to arbitration, or to settle their differences in court, does a disinterested third party come on the scene.

Some specific comments.—Although the two proposals before us share general objectives, they approach those objectives by different routes. This has led to significantly differing threatment of comparable provisions. Some of those differences are discussed below.

1. Preemption of state law.—In Amendment No. 16, Senator Dodd would preempt state products liability standards constituting rules of law applicable to a civil action for products liability (Section 305(a)). Both the language of the bill and Senator Dodd's testimony emphasize a need for uniformity of treatment of those injured in product-related accidents. The goal of uniformity is to be achieved by two optional methods of relief with the choice of option left to the claimant. He may opt for the alternative compensation system under Title II[4] or he may sue under Title III. In a Title III lawsuit under Section 301, the manufacturer is ". . . liable under this title if the claimant establishes that the injury complained of was the result of the failure of the manufacturer . . . to exercise reasonable prudence . . ." and mandates the application of strict liability, "if State law so provides" to manufacturing defects and breaches of express warranties. The liability standards therefore appear to be similar to those that S. 100 would establish: Fault-based or negligence standards for design defects and failures to properly warn or instruct cases, and strict liability for manufacturing defects and breaches of express warranties.

Senator Gorton has taken a different tack. In his statement to this Subcommittee on June 18 at page 5, Senator Gorton said, "I am very troubled . . . by the prospect of substituting a federal standard of liability . . . for the substantive law of the several states." With this conviction as his point of departure, preemption of state law under the Gorton proposal would be fairly limited. It would prohibit damages for noneconomic losses (e.g., pain and suffering and punitive damages) in design defect and failure to warn cases where liability is established on a basis of strict or absolute liability in tort. The prohibition would not apply where liability is based on negligence. (This concession may be more seeming than real inasmuch as a products liability complaint invariably includes a negligence count.) Beyond this rule of law change, Senator Gorton would establish a series of largely procedural provisions which would preempt state law by requiring uniformity. They include:

1. A uniform statute of limitations.
2. A uniform statute of repose based on the "useful safe life" of the product.
3. A uniform choice of law rule.
4. A uniform rule on joint and several liability.
5. A uniform rule on the admission of evidence of subsequent remedial measures.
6. A uniform rule of the liability of the product seller.

"In my view," said Senator Gorton in his June 18 testimony,[5] "once these uniform rules are superimposed on the negligence rules of the states, the variation remaining among the negligence laws of the states will be slight indeed, and certainly insufficient to warrant the imposition of a Federal substantive rule of liability with the uncertainty involved in so doing, as well as the political problems associated with it."

We understand Senator Gorton's position, but as between these two approaches we prefer that taken by Senator Dodd. Our preference is grounded in our belief that there is an overriding need for uniform rules of products liability law and it seems to us the Dodd proposal goes farther toward achievement of that objective.

2. Impossibility of identifying the manufacturer.—Both proposals deal with this situation only as it applies to alternative compensation claims and not as to actions in tort at law. The treatments are different, although it is possible that they were intended to be the same and both would adopt the market-share theory of the *Sindell* decision.

Senator Dodd's proposal indicates that a "claimant" who cannot identify the product causing injury may file his claim with ". . . any manufacturer of a product that is functionally identical to and interchangeable with the product which caused the claimant's harm. . . ." Such a manufacturer is liable to the claimant ". . . if that manufacturer's product was available at the time when, *and in the market in which*, the product which caused the claimant's injury was purchased . . ." (Section 201(b).) (Italic supplied.)

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[4] Under the Dodd proposal a Title II claim may eventuate in a lawsuit under that Title, but with lower standards of proof and lesser potential liability than under Title III.

[5] Transcript of Proceedings, page 40.

As for Senator Gorton, his proposal says that "Where a claimant is unable to identify the manufacturer or product seller of the product which caused the claimant's harm, a claimant under this title is entitled to recover from a manufacturer or product seller who had any share of *the national market for the product* . . . at the time the harm occurred or at the time of the exposure to the product."[6] (Italic supplied.)

The *Sindell* decision, it will be remembered, was adopted by the California court and, although intended to apply to the national market, has been widely rejected by other jurisdictions.[7] Senator Gorton's proposal would greatly enlarge the applicability of the *Sindell* rule and, incidentally, frustrate the Senator's avowed purpose of doing the least possible violence to existing law. In short, those who espouse the cause of state court independence would impose upon all the states a theory expressly rejected by many of them.

The puzzle becomes even more interesting when we consider Senator Dodd's description of a manufactuer having a share of the market but without specifying the scope of that market. Is it national, state, or local? Why not international?

If any such provision were to find its way into a statute, we believe its application should be limited to the state market in which the product causing the harm was purchased.

3. Recovery of compensation benefits in state court.—Section 301(a) of Senator Gorton's proposal says, "Any claimant who does not bring a product liability action under title II of this Act may file a claim in accordance with this title. The election to bring a civil action under title II of this Act, to accept compensation benefits tendered in accordance with this title, or to bring a civil action under this title shall be binding on the claimant."

In short, having made his bed, the claimant must lie in it. His decision is irrevocable? Well, not quite. Consider Section 213(a) which seems to us absolutely contrary to the spirit of Section 301 quoted in part above. Remember that title II is concerned with a "Product Liability Action" with jurisdiction limited generally to state courts. Section 213(a) says:

"In any action brought subject to the provisions of this title in which the claimant alleges a defect in the design of a product or a failure to warn or instruct about a product or its use and in which the trier of fact finds that the claimant is not entitled to damages under applicable State law but would have been entitled to compensation benefits from the defendant had the claimant brought a claim pursuant to title III of this Act, the court shall enter judgment in favor of the claimant for the amount of compensation benefits (as determined by the trier of fact), except that such benefits shall not include any amount allocable to the attorney's fees and costs incurred in preparation for or during trial."

In other words, if you cannot score with big casino, there will still be a consolation prize. It seems to us that this provision seems to encourage a judicial search for some means by which the claimant will be entitled to something. The provision violates the concept of an irrevocable decision, is unfair on its face, and should be stricken.

4. Statutes of repose.—Senator Gorton's proposal would exempt, subject to three exceptions, a manufacturer from liability where it proves that the harm was caused after the "product's useful safe life." In any action at law under Title II, a rebuttable presumption is raised that harm was caused after the useful safe life of the product.

(A) If, in the case of a capital good, the harm was caused more than 25 years after the time of delivery of the product; and

(B) If, in the case of a product which is not a capital good, the harm was caused more than 12 years after the time of delivery of the product.

Senator Dodd does not address the question in his proposal.

We have two objections to Senator Gorton's proposal. First, a statute of repose should provide repose and not the chancy protection of a rebuttable presumption. Second, 25 years is too long a period. We recommend 15 or 20.

5. Attorneys fees.—We are commenting on this issue because both Senators have stressed the need to reduce the "transaction costs" of products liability, a phrase which strikes us as a euphemism for lawyers' costs. The proposed alternative compensation systems would not do away with the need for the help of a lawyer. The average consumer would not be likely to understand his rights under any such system nor understand how to assert those rights. Enter the lawyer.

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[6] Section 311(a)(1).

[7] "Market share liability has been rejected by most courts as an ill-conceived solution based on policy grounds, not legal precedent." 11 Ohio Northern U. Law Review 148.

How much will a lawyer's service be needed? And what will those services cost?

Both proposals raise four possible courses of action: (1) a claim is filed with a manufacturer under the alternative compensation procedure which, after negotiation, the manufacturer pays—at least in part; (2) by agreement of the parties a dispute as to liability of the manufacturer under an alternative compensation claim is submitted to binding arbitration; (3) a claimant under an alternative compensation claim, having had his claim rejected, may sue the manufacturer in a special proceeding authorized in a part of the alternative compensation system; and (4) the claimant sues the manufacturer in a customary tort suit.

The services of a lawyer will certainly be required in cases (3) and (4). They will almost certainly be required in (2), and they will probably be required in (1).

This is the scenario we foresee if an alternative claims system becomes law. The average consumer is likely to learn of the system only through a lawyer whose newspaper or television advertisement next following adoption of the statute will feature the availability of a new legal service and, of course, some easy money. In this case the lawyer will not only propose the claim, he will serve as the claimant's agent (attorney) in serving the demand it represents on the manufacturer. And he will continue to represent the claimant in either arbitration or a lawsuit, if it comes to that.

As for lawyer involvement, there will be little or no reduction and there may in fact be more. Obviously, the authors believe that legal costs overall will decline because, in reducing the award and eliminating noneconomic damages, the case to which the plaintiff's attorney's contingent fee applies will be reduced. Insofar as claims are paid by the manufacturer there will be no defense attorney's costs. If, however, as we suspect, the payment of claims straightaway is a mirage and that an attorney advisor will be retained to shepherd a claim through even an undisputed settlement with the manufacturer, the reduction in overall legal costs will be very small.

Let us continue our scenario but change our scene to the view from the personal injury lawyer's office. At present such a lawyer, operating on a contingent fee basis, may have to wait years for his share of the award—and there may never be an award. Under both proposals, he retains the long-range, contingent fee option. Now, however—because he is the conduit through whom the new system will become known—he will acquire additional clients providing him with a source of current, rent-paying income on a relatively risk-free, fee basis. The income of the personal injury lawyer might well increase with the increase coming from increased system "transaction costs."

On balance, in our judgment, legal costs will be reduced very little, if at all.

OUR CONCLUSIONS AND RECOMMENDATIONS

By now, the reader will have surmised that we do not favor either the Dodd or the Gorton proposal. This does not mean, however, that we are totally opposed to the concept underlying these proposed amendments to S. 100. Products liability law is such a monstrous problem today—uncertain and uneven in content; erratic and frequently unfair in application; enormously costly in money, time, and talent; and becoming more so yearly—that industry needs any help it can get in finding a solution.

All in all, we believe an alternative compensation system may have merit, but the concept, in our opinion, needs more thought, more refinement and, above all, more assurance that it can work. Our recommendations are as follows:

1. Proceed with enactment of S. 100 providing by appropriate amendment for continuing study of an alternative compensation scheme. Unlike the latter idea, S. 100 has had four years of congressional massage while the problem it addresses has grown worse.

2. If, notwithstanding insufficient study and no experience, it is the judgment of Congress to proceed with enactment of a bill containing some kind of alternative compensation scheme, then we think the measure should follow the guidelines suggested below:

Incorporate those portions of S. 100 which would preempt state law, prescribe product liability standards, reduce product liability damages by the amount of any workers' compensation payment, establish a statute of repose, limit the award of punitive damages, and restrict the admissibility in evidence of subsequent remedial measures.

Restrict "no-fault" compensation, at least in the beginning, to some well-defined class of cases where there is little or no argument concerning the claimant's entitlement.

Make the alternative compensation scheme optional. We do not object to the use of incentives to encourage use of the option so long as none of them lights up the "tilt" sign.

Provide for an independent third party or agency to act as an "honest broker." We are attracted to the scheme suggested by Professor Jeffrey O'Connell because, among other things, it provides for what we regard as the indispensable intermediary (in Professor O'Connell's example, the court).

If the market share theory of the *Sindell* case is retained, its application should be limited to the state market in which the product causing the harm was purchased.

This concludes our statement on these somewhat differing proposals for optional compensation systems in products liability cases. Again we want to thank the Chairman and the Subcommittee for the opportunity of submitting these comments.

If the Institute or its staff can be of further assistance in this matter, please do not hesitate to call on us.

Respectfully,

CHARLES STEWART,
President.

NATIONAL RETAIL MERCHANTS ASSOCIATION,
Washington, DC, July 9, 1985.

Hon. ROBERT W. KASTEN,
Chairman, Consumer Subcommittee, Commerce, Science and Transportation Committee, Senate Hart Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I am writing on behalf of the National Retail Merchants Association ("NRMA") to provide testimony on the proposed compensation amendments on which your Subcommittee held hearings on June 18 and 25, 1985. We request that this letter be included as part of the official record of those hearings.

By way of background, the NRMA is the nation's largest trade association for the general merchandise retail industry. Our members operate 45,000 leading department, chain, independent and specialty stores in all 50 states. Annual sales exceed $150 billion and members employ more than 3 million workers. Accordingly, fundamental revision to the product liability law is of significance to NRMA and its members.

BACKGROUND

The NRMA is pleased that the Senate Commerce Consumer Subcommittee is continuing to explore methods for improving product liability law. The current system is a morass. The complexity of present law and its considerable variance from state to state benefits neither consumers, manufacturers, nor retailers. In many instances, consumers who suffer substantial losses recover nothing, either because the laws in their states preclude suit or because the extent of their injuries is insufficient to support a contingency fee, and the cost of prosecuting such a claim is too great to justify the expense.

Perhaps to counter this expense, those claims that are brought often seek exorbitant amounts relative to the level of injury. Such multi-million dollar claims place manufacturers at tremendous risk.

Their insurers seek ever increasing premiums and those costs are borne, ultimately of course, by consumers.

Retailers are caught in the middle. Although retailers are seldom adjudged responsible for those defects that cause consumers problems, in nearly every instance, the retailer is made a party to the action and is forced to defend against it. Appearing in such actions is expensive and, unfortunately, it is again other consumers who bear the cost.

S. 100, the bill which you introduced, would have reduced some of the costs associated with product liability claims by establishing certain uniform legal standards. It would also have introduced greater equity into the product liability system by reducing the advantages that would accrue to certain parties solely by virtue of the law that governed actions in a particular state.

There were also problems with S. 100. Although many years of work had gone into its drafting, from a retail perspective, S. 100 did little to reduce the costs associated with retailers trapped in the middle of a product liability claim regarding a product over which they exerted virtually no control. NRMA spoke with Congressional staff persons regarding its members' concerns and we are grateful that they indicated a willingness to consider them further. Since that time, however, the Subcommittee has expressed its view that the "compensation" product liability amendments advanced by Senators Dodd and Gorton should also be considered.

INITIAL REACTIONS AND PRINCIPLES

At the outset, we must state that these two amendments present interesting and novel approaches to product liability reform. Indeed, they are sufficiently new that we cannot state with confidence their effect on the product liability process generally, nor state with certainty their effect on retailers. As we all are aware, the secondary and tertiary effects of facially inoffensive proposals can sometimes be as serious as the problems the proposals were designed to correct. For this reason we urge the Subcommittee to give the compensation amendments as careful and deliberate consideration as was given the precursors of S. 100. That the Subcommittee began this process by scheduling two days of hearings on the proposed amendments is a welcome sign.

Our initial review of the amendments suggests that the proposals contain some potentially beneficial provisions, but also offer serious grounds for concern.

As retailers, the relationship between us and our customers is direct, very close and extremely important. Our sole function is to serve their needs and it is important to us that their needs are met.

Both of the proposed amendments seek to establish a product liability system that removes the number of intermediaries and impediments between an injured consumer and a fair recovery. Eliminating hotly contested punitive damages in some cases in order to develop a process for expeditiously compensating real economic losses is a laudable goal. It is far preferable that a larger number of consumers receive full compensation than that a very few benefit from a high stakes lottery. To this extent, the focus in both amendments on providing a greater number of persons with full reimbursement for actual economic losses, in lieu of providing extravagant damages for a few, is in the interests of retailers and their customers. Our view of other provisions, however, is considerably less sanguine.

In whatever system is adopted, we should not stray far from the proposition that the cost of current product liability claims should be borne by the party most directly responsible for their occurrence and/or most capable of reducing such injuries in the future. When responsibility is divided, then the cost of claims should be distributed in such a manner that each party has an incentive to reduce its share of the burden without creating an offsetting burden on other parties.

CONCERNS: IDENTIFYING THE MANUFACTURER

Retailers are rarely the cause of product liability injuries. In most cases, they are conduits for the delivery of other parties' products. In a few instances, such as when a retailer alters or impairs a product in such a way as to make it injurious to users, or if a retailer makes unwarranted claims as to a product's safety, or if a retailers fails to pass on warnings from the manufacturer, then the cost of subsequent injuries should generally be the retailer's responsibility. But such situations are rare.

Both amendments recognize this, in part. For example, both propose that injured parties' claims be directed against the manufacturer in the first instance. This is appropriate. However, both proposals would deem retailers to be manufacturers in situations where they clearly are not. This will have costly and confusing consequences.

Under the Gorton proposal, a retailer is deemed responsible for products marketed under its trade or brand name regardless of their actual manufacturer. The Dodd proposal makes a retailer responsible if it "holds itself out as a manufacturer," an ambiguous concept. What these constructions miss is that a great many consumer products are produced by relatively few manufacturers. They are sold by hundreds of varying sized sellers and differ only in that the manufacturer sews or affixes a particular retailer's name or label to the product just before delivery.

Thus, for example, dozens of retailers nationwide may sell identical sport shirts made by a single large producer. If, due to a manufacturing error, the dyes in one batch badly irritate the skin of some users, the retailers are not any better able to avoid such problems in the future merely because their name, rather than the actual manufacturer's name, appeared in the collar. Nevertheless, each retailer that sold the offending shirts would be required to go through the compensation process and then seek a separate recovery in court against the actual manufacturer. This result would not only blunt the market mechanisms in the product liability system by only belatedly making the manufacturer responsible for its errors; it would also increase transaction costs for retailers to no good effect. Furthermore, if each local retailer receives very few of the defective products, they are unlikely to have the perspective necessary for them to recognize the claims as the result of a consistent failure. Consequently, individual retailers are more likely to mistakenly contest apparently sporadic claims than is the manufacturer, who is in a better position to ascertain a pattern of problems with a particular batch of goods. Thus, making retailers responsible in the first instance for items they did not produce is likely to result in a greater number of contested (and inconsistent) judgments.

A preferable alternative is to allow retailers to remove themselves from a compensation claim if they are willing to expeditiously identify the responsible manufacturer. The consumer's claim would be maintained against the actual manufacturer on the same basis as would any other claimant's. The proper incentives would remain n place and spurious transaction costs would be reduced. Of course, if the seller wished to protect its sources, or maintain the illusion that it was the actual manufacturer of the product, it could do so, but at the cost of processing compensation claims itself.[1]

Under current product liability law, formulations such as this have been adopted by several states (e.g., Illinois). Naturally, if a claim cannot be maintained against the actual manufacturer because it is insolvent or not amenable to service of process, then the retailer would be forced to carry a share of the cost burden in the first instance. And, of course, in those relatively few cases where the retailer actually designed or manufactured the injurious product (or the relevant component part of the product), the retailer would be treated as the manufacturer for the purposes of that particular claim.

CONCERNS: COSTS

An apparent goal of both proposals is to provide recovery for economic loss to a larger pool of individuals than are compensated under current law. Under current law, potential product liability claims probably resemble a pyramid. At the top are a small number of sensational claims commanding great sums of compensatory and punitive damages. Beneath are a larger segment of claims for serious injuries and damages. Both of these groups often recover under our current tort system. Dropping to the base of the pyramid are a very large number of modest claims, small cuts or minor burns, that cause some discomfort and may entail some economic loss (e.g., time off for a doctor's visit), but are not debilitating injuries. These are generally not addressed under law. Up the pyramid from these claims are a sizable number of moderate to serious injuries, involving perhaps several hundred to five or six thousand dollars in economic loss, that are poorly served under current law. It is this last group of claims that should be the first priority of these reforms.

The cost of court cases and legal advice, the burdens of proof, and the time lost from work or other responsibilities in repeated physical examinations, depositions, trials, or meetings, militate against recovery for this group. A reform that lessens recoveries at the top of the pyramid in order to aid this group provides a greater good for a greater number at no increase in overall costs. By limiting recovery in design and failure to warn cases, unless the manufacturer is shown to be negligent, sufficient costs may be saved to effect the proposed redistribution. But the distribution downward can go only so far without creating unintended effects as was suggested earlier.

For example, one of our retail members has estimated that the cost of processing product liability claims under the current system averages more than $600 per incident. This includes the cost of investigating claims, handling correspondence, coordinating with other parties, and maintaining an umbrella policy for exceptional claims. In 95 percent of the claims against this retailer, they are not judged the responsible party and in most of the remaining five percent, they self-insure. These latter costs are not reflected in this $600 figure. Thus, $600 represents that retailer's average cost of handling each of the product liability claims brought against it whether meritorious or not.

If, under the proposed compensation plans, product users are encouraged to bring seventy dollar or one hundred and seventy dollar claims against retailers, a problem arises. Even assuming that the cost of processing claims could be brought down by an average of $100, it could still easily cost retailers in such cases five times as much to process a claim as it was worth. This may be a shocking or distressing result, but the consequences of it are very real.

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[1] Perhaps this is what is meant by the language in the Dodd amendment indicating that a retailer is deemed to be a manufacturer if it "holds itself out as a manufacturer *to the user of the product.*" (Emphasis added.) Arguably, once a retailer has disabused a user of the notion that the retailer is the manufacturer, by supplying the name of the actual manufacturer, then the user's claim can be directed to that party. As was noted, the language is ambiguous. If this is the intention, then the language should be clarified. If this is not the intention, then, in the interest of maintaining proper costs and incentives, the language should be changed.

No retailer could for long pay out $500 (plus the cost of compensation) to every individual presenting a claim. In the short run, it could investigate claims less thoroughly as a means of holding down its costs. But in the long run, this would drive up the retailer's cost as greater numbers of meritless claims were paid. In addition, the smaller the amount of the claims accepted, the greater number of claims, both legitimate and illegitimate, that are likely to be made. No retailer could reasonably be expected to determine, at any reasonable cost, whether a $60 doctor's bill to treat an arm burn (and the claim of half a day's lost wages) were proximately caused by its toaster. The proposed amendment do not address this problem in any meaningful fashion.[2]

We do not know the answer to this dilemma. Nevertheless, it seriously threatens the viability of the proposals. We can suggest one short-term alternative: Place a reasonably large deductible on any claim handled through the compensation system. As a start we would suggest five hundred dollars. Many claims in that large middle pool currently missed by our tort law system (e.g., claims under a few thousand dollars) would be expeditiously addressed. Large numbers of people with moderate to serious injuries would be compensated. However, manufacturers and retailers would not be forced to subsidize large numbers of legitimate and illegitimate claims whose validity could not be ascertained.

That the proposed reforms are not so sweeping as to provide a remedy for all problems is not a detriment, so long as they conscientiously succeed in resolving many existing problems without introducing additional difficulties. Once the new system is in place, experience will demonstrate whether the deductible could be reduced further. We offer this only as an avenue for consideration. Perhaps additionl hearings will suggest more effective alternatives. In this regard, however, the current proposals are seriously flawed.

CONCERNS: GENERIC CLAIMS

Finally, Sections 202(b) and 207, of the Dodd amendment, provide that where claimants cannot identify the manufacturer of a product, they may institute claims against any manufacturer of a functionally identical product and recover from that manufacturer. That manufacturer may then seek an aliquot contribution from other manufacturers on an equitable basis, presumably in relation to their share of the market. We believe that this provision will cause a great deal of difficulty.

At the outset, the process will introduce enormous transaction costs, even greater than those discussed in the preceding section, every time such a claim is made. A court case (as provided by Section 207) against every other manufacturer of an arguably functionally equivalent product each time someone makes a $1,000 claim is an inordinately expensive proposition. But if it is not done, then the manufacturer whose name comes most readily to mind will become the *de facto* insurer for the entire industry. The manufacturer need not be the industry leader, merely the best known brand. How many people injured by an unknown power tool would think to say that it was produced by anyone other than Black & Decker?

These sections exacerbate the ambiguous status of retailers as well. Some of the nation's largest retailers sell products, such as televisions, produced for them by other manufacturers with modest non-functional stylistic changes and a house brand name. If, for that reason, these retailers are deemed "manufacturers" under the amendment, they would be forced to contribute to generic compensation claims based on their share of the market, even though every product sold by them was produced by someone else. The retailers of house brand goods, which often sell at very favorable prices, would be forced to subsidize claims against more expensive brand name producers. Once again, this problem could be reduced were retailers not deemed to be manufacturers in those cases where they identify the actual manufacturer to the party seeking reimbursement.

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[2] Allowing retailers to recover for fraudulent claims is an insufficent response. First, in order to ferret out fraud, the retailer would be obligated to do even more investigating, thus further raising its costs. Furthermore, the problem is not merely one of fraud. Increased avenues of compensation will, in time, diminish some individuals' level of care. More important, paying several times a claim's value to process it introduces a gross inefficency into the marketing system. Costs will either have to rise dramatically to meet it, or the variety and type of products offered will be seriously curtailed.

CONCLUSION

NRMA applauds the Subcommittee's efforts at serious product liability reform. We believe that the two proposed amendments provide intriguing alternatives to the current tort system. However, they require substantial additional consideration. The proposals are too new to allow an accurate assessment of the costs of their enactment. We have suggested some preliminary alternatives. Further study is needed. We would encourage the Subcommittee to hold additional hearings on these proposals (or possibly consider encouraging outside studies) to assist in gauging their viability.

Sincerely,

Tracy Mullin,
Senior Vice President,
Governmental Affairs.

Deane, Snowdon, Shutler & Gherardi,
Washington, DC, July 9, 1985.

Hon. Robert W. Kasten, Jr.,
Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

Dear Mr. Chairman: Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation recently held hearings on the amendments of Senator Christopher J. Dodd (D-Conn.) and Senator Slade Gorton (R-Wash.) to S. 100, the Product Liability Act. I represent and am writing on behalf of the Specialty Equipment Market Association (SEMA), a trade association composed of 1,800 members, including manufacturers and distributors of specialty and custom aftermarket parts and accessories for motor vehicles. We submit this letter as written testimony in support of a uniform product liability standard and request that it be included as part of the record of these hearings.

SEMA's membership is comprised of small businesses whose goods travel in the stream of interstate commerce. The present variety of state product liability laws has left our members uncertain with regard to their varying duties and defenses. In addition, our members are faced with exorbitant costs of product liability insurance and potential legal fees. We, therefore, strongly supported S. 100. We have endorsed the concept of a Federal uniform product liability standard and urge this Subcommittee to reconsider legislation that will establish such a standard.

It is clear from the testimony heard by this Subcommittee that, with the exception of the American Bar Association, all interested parties have reached the consensus that the present product liability system is badly in need of reform. In light of this, SEMA recognizes that reform legislation that does not include some sort of an alternative compensation scheme will not be adopted. We are also aware of the difficulties involved in drafting an alternative mechanism that is agreeable to all parties involved. That is why we suggest that before actually drafting an alternative compensation scheme that a uniform standard be enacted and a review panel, as outlined in Section 17 of S. 100, be created. This would provide the panel with sufficient time to study the effect of the new standard and to determine whether there is still a need for a compensation alternative and what the economic consequences of it will be on various industries. It has reached the point where reform action must be taken as soon as possible, however, it is too much of a risk to adopt something as new and different as a no-fault compensation scheme without fully understanding its potential effect.

If a consensus cannot be reached on the proposed review panel, then SEMA would support a two-tiered system that included a tort element and a compensation scheme.

With reference to the specific proposals being considered by this Subcommittee, SEMA opposes Senator Gorton's amendment due to its failure to include a uniform standard in its tort reform element. However, SEMA views Senator Dodd's amendment as a good base from which to structure a reform product liability system.

There are, however, several points with which we disagree in the Dodd proposal. First, we do not agree with imposing liability on any manufacturer for the responsibility of others as a result of the claimant's inability to identify the manufacturer of the defective product. It is unjustified to assume that two products which are functionally identical and interchangeable are also identical in quality. Second, the tort element should not include strict liability as a theory of recovery for construction defect and breach of express warranty cases. SEMA takes the position that since the business community is willing to compromise and support a no-fault compensation system, that the tort element should not also include a no-fault theory of recovery. Third, we recommend that the theory of comparative negligence control in cases litigated under the tort element. We feel that this is the most equitable approach to adopt in product liability cases. As introduced, the Dodd proposal is silent as to the method for determining responsibility in a product liability action where both parties were shown to be negligent. Instead, it defers this issue to present state law. By doing this, the amendment maintains the present patchfwork of state laws for an important product liability issue. Finally, with regard to the issue of punitive damages under the tort element, we suggest that a uniform standard similar to the one found in Section 12 of S. 100 be adopted instead of relying on state law to determine this issue.

As already stated, SEMA wholeheartedly supports reform of the present product liability system. Although we would prefer to see legislation similar to S. 100 adopted, SEMA will support legislation containing an alternative compensation system, provided that the tort element contains a uniform standard and the compensation scheme adequately protects the interests of the business community.

We urge your Subcommittee to take immediate action to reform the present product liability system. Please feel free to contact me if I might be of any further assistance.

Sincerely,

JOHN RUSSELL DEANE III,
General Counsel,
Specialty Equipment Market Association.

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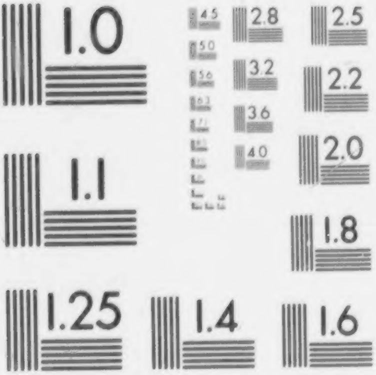
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